Supreme Court, U.S.
FILED
04 250 AUG 12 2004
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No.

IN THE

Supreme Court of the United States

ROBERT CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether a sentence increased beyond the statutory maximum for the crime of conviction violates the principles of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. _____, 124 S. Ct. 2531 (2004), when it is based on facts not presented to the jury as elements of the offense and thus on facts not proven to the jury beyond a reasonable doubt but rather on a judge's findings by a preponderance of the evidence?

II.

Should the cumulative effect of all of trial counsel's errors be analyzed in considering whether counsel's deficient performance was so prejudicial as to constitute ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was filed on April 20, 2004. It is reported at *Campbell v. United States*, 364 F.3d 727 (6th Cir. 2004). It appears at Appendix ("App.") 1a -20 a.

The District Court's Order Adopting Magistrate Judge's Report and Recommendation was filed on January 6, 2003. It is reported at *Campbell v. United States*, 266 F. Supp. 2d 587 (E.D. Mich. 2003). It appears at App. 21a -27a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Sixth Circuit's Opinion was entered on April 20, 2004. The petition for rehearing was denied on May 17, 2004 (App. 28a). This petition for a writ of certiorari is filed within ninety days of the denial of rehearing.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Proceedings

Campbell was originally indicted on August 15, 1996, in a superseding indictment, which added him as a co-defendant and charged him with drug law violations. After a second superseding indictment was returned, trial began on May 20, 1997, and concluded on May 29, 1997, with the district court declaring a mistrial as to Campbell because of a hung jury. A second trial began on August 21, 1997, and concluded on August 29, 1997, again with the district court declaring a mistrial because the jury was unable to reach a verdict.

After a third superseding indictment was returned against Campbell, a third trial began on July 16, 1998. It concluded on July 22, 1998, with a verdict of guilty of conspiracy to possess with intent to distribute and to distribute controlled substances, in violation of 21 U.S.C. §846 and §841(a)(1), and guilty of two substantive offenses of aiding and abetting others to possess with intent to distribute controlled substances, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. On September 25, 1998, Campbell was sentenced to serve a term of imprisonment of 324 months.

On October 19, 2000, the United States Court of Appeals for the Sixth Circuit filed an Amended Opinion (unpublished), which affirmed the judgment of sentence, but by a 2-1 vote, with Circuit Judge Clay dissenting from the decision by the other two members of the panel. Campbell's subsequent petition for rehearing was denied.

On August 20, 2001, Campbell filed a Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence. The Magistrate Judge filed a Report and Recommendation on January 24, 2002, in which he said that the court should deny Campbell's Motion.

Subsequently, Campbell filed Objections to the Report and Recommendation. On January 6, 2003, the District Judge entered an Order Adopting Magistrate Judge's Report and Recommendation and denying the §2255 Motion (App. 21a -27a). On April 20, 2004, the Sixth Circuit entered an Opinion affirming the District Court's judgment (App. 1a-20a). On May 17, 2004, the Sixth Circuit denied the petition for rehearing. (App. 28a).

Facts

Various co-defendants pled guilty and testified as part of their plea bargains with the government. They said that various trips were taken from Detroit to New York to secure controlled substances and then to return to Detroit and subsequently distribute those substances. Robert Campbell was implicated as a participant who contributed money to the purchases in New York and accompanied others to New York and on their return to Michigan. In his own defense, Campbell denied the allegations and maintained that he was not a participant in the conspiracy or substantive offenses.

Additional facts, where pertinent, will be discussed *infra*.

REASONS FOR GRANTING THE PETITION

I.

It is necessary for the lower courts to be instructed, in accord with the principles of *Apprendi* and *Blakely*, that a sentence cannot be enhanced beyond the statutory maximum based on a judge's findings by a preponderance, and any constitutional error in that regard is not harmless.

Under the doctrine of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), this Court held that a sentencing judge cannot increase a defendant's sentence beyond that authorized by the statute for facts not reflected in the jury verdict. *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004). In *Blakely*, the Court ruled that the Washington state statutory procedure for sentencing is unconstitutional; a sentence which is enhanced on the basis of facts other than those found by the jury in convicting a defendant violates the Sixth Amendment right to a jury trial. *Id.*

Under *Apprendi*, any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. As the Court in *Blakely* made clear, the "statutory maximum" is:

> the maximum sentence a judge may impose <u>solely on the basis of the facts reflected in the jury verdict or admitted by the defendant</u>. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose <u>without</u> any

> additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

124 S.Ct. at 2537 (citations omitted, emphasis in original). [1] In the instant case, Campbell's enhanced

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[1] On direct appeal, the Campbell case had been briefed and orally argued before *Apprendi* was decided on June 21, 2000. However, the *Apprendi* decision was rendered before the filing of the Sixth Circuit's Amended Opinion on October 19, 2000. One of the issues in Campbell's direct appeal had been his contention that the district court had erred in calculating the quantity of drugs used to determine his sentencing guideline range by failing to make the requisite findings of fact. The Sixth Circuit disagreed with the contention. In the §2255 proceedings, Campbell contends that his sentence violated the *Apprendi* principle. This claim is properly raised since it relies on a constitutional rule that was decided while his case was pending on direct appeal. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708 (1987) (. . . a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . .). Here, Campbell's case had been briefed and orally argued, but not decided by the Sixth Circuit before the opinion in *Apprendi* was handed down; the Sixth Circuit's decision in Campbell came after *Apprendi*. Since the Campbell appeal was pending on direct review at the time *Apprendi* was decided, the new rule in *Apprendi* for the conduct of criminal prosecutions is to be applied retroactively to Campbell.

The prejudice requirement is satisfied because Campbell's sentence was increased beyond that authorized by law. His sentence should have been determined by 21 U.S.C. §841(b)(1)(C), which sets a sentencing range with a maximum of 20 years imprisonment. Thus, granting relief under Campbell's §2255 motion would achieve a different result, since resentencing would require a significant reduction in his current term of imprisonment.

sentence under the United States Sentencing Guidelines (USSG) based on drug quantity is unconstitutional. It exceeds the statutory maximum absent the jury finding essential facts beyond a reasonable doubt. It is improperly based on a judge's findings by a preponderance of the evidence.

Over Campbell's objection, the sentencing judge found drug quantity by a preponderance that placed Campbell in a guideline range exceeding the maximum penalty prescribed by statute. The judge then imposed a sentence of 324 months, which is 84 months (or 7 years) longer than the statutory limit. By allowing this to withstand review, the Sixth Circuit has decided the issue in a way that conflicts with the principles of *Apprendi* and *Blakely*, which require a holding that the USSG were unconstitutionally applied to Campbell because their use resulted in an enhanced sentence, i.e., beyond the statutory maximum, based on facts not admitted by him or found by a jury. [2]

In addition, the record is clear that Campbell has consistently and repeatedly objected to the drug quantity calculations used in determining his sentence. He did this by first filing a written Objection to the Presentence Report and then disputing the quantity at his sentencing hearing. Later, he raised this issue on direct appeal. Accordingly, Campbell has preserved his *Apprendi* challenge. See *United States v. Strayhorn*, 250 F.3d 462, 467 (6th Cir. 2001).

Undoubtedly, a sentencing error occurred. It affected Campbell's substantial rights and seriously affected the fairness and integrity of the judicial proceedings. In the alternative, the failure to make an *Apprendi* objection in the district court was due to the ineffective assistance of counsel. Therefore, the issue is cognizable in a §2255 motion.

[2] The *Blakely* holding applies equally to the USSG since the federal guidelines appear to be indistinguishable from the

In the Third Superseding Indictment, Campbell is charged with conspiracy to possess with intent to distribute and to distribute controlled substances in violation of 21 U.S.C. §§841 (a)(1) and 846 (Count I). These substances are described as heroin and cocaine, but no specific quantities are stated. He is also alleged to have aided and abetted others to possess with intent to distribute approximately 34 kilograms of cocaine (Count II) and approximately 2 kilograms of heroin (Count III),in violation of 21 U.S.C. §841 (a)(1) and 18 U.S.C. §2. As a result of the specific quantities alleged in Counts II and III, Campbell was facing a sentence of a minimum of 10-years imprisonment and a maximum of life imprisonment, if the jury found beyond a reasonable doubt that he aided and abetted others to possess with intent to distribute at least these quantities. (21 U.S.C. §841 (b)(1)(A)). However, the jury made no finding with respect to quantities. In fact, the jury was instructed by the trial court that the amount of controlled substances was not an element of either offense, and thus they were not facts proven to the jury beyond a reasonable doubt. (R.484, TR. Vol.IV, 7/21/98, pp.88-89.) Nor was there a special jury verdict specifying the quantity of drugs. In fact, the jury was instructed that the government need not prove the actual amount of the controlled substances as alleged in the indictment. The district court said:

Washington state system. Furthermore, a number of courts have held *Blakely* to be controlling and declared that it applies to the USSG. See, e.g., *United States v. Booker*, 2004 U.S. App. Lexis 14223, No. 03-4225 (7th Cir. July 9, 2004); *United States v. Ameline*, 2004 U.S. App. Lexis 15031, No. 02-030326 (9th Cir. July 21, 2004). This Court has granted certiorari in the *Booker* case, which will be heard on the first day of the new court term in October, 2004.

> The evidence in this case – received in this case need not prove the actual amount of the controlled substance that was part of the alleged transaction or the exact amount of the controlled substance alleged in the indictment as possessed with the intent to distribute by Mr. Campbell, but the government must prove beyond a reasonable doubt that a measurable amount of the controlled substance was in fact knowingly and intentionally possessed with the intent to distribute by Mr. Campbell.

(R. 484, TR. Vol. IV. 7/21/98, pp. 88-89). By these words, it is clear that the jury was told that the amount of the controlled substances was not an element of either offense, as alleged in Counts II and III, and that only a "measurable amount" need be proven. Therefore, it is certain that the jury did not and could not have made a finding beyond a reasonable doubt that Campbell aided and abetted in the possession of 34 kilograms of cocaine or 2 kilograms of heroin.

But in sentencing Campbell, the judge made a determination of particular drug quantities (which served as the basis for the sentence enhancement) under the "preponderance of the evidence" standard (R.489, TR Sentencing, 9/25/98, p. 16). The judge said that Campbell was responsible for 150 kilograms (USSG Level 38) rather than 34 kilograms (USSG Level 34), and erroneously sentenced Campbell based on this finding. This sentence is constitutionally improper under the *Apprendi* and *Blakely* principle because it resulted from a non-jury factual determination increasing the maximum sentence beyond the 20-year statutory maximum authorized by

the jury's verdict. This increase is not permissible, and therefore Campbell's sentence of 324 months (or 27 years) imprisonment is erroneous.

Campbell's sentence should have been determined by 21 U.S.C. §841 (b)(1)(C), the "catchall" penalty provision which establishes a sentencing range of zero to 20 years imprisonment. The maximum sentence could only have been 20 years imprisonment, regardless of what the sentencing judge might have decided at the time of sentencing. See 21 U.S.C. §841(b)(1)(C) (20 year statutory maximum for cases in which no particular quantity of Schedule I or II controlled substances involved.) Absent a specific jury finding or factual determination of drug quantity, the statutory range authorized by the jury's verdict is the default statutory maximum of 20 years. The error under *Apprendi* and *Blakely* is that Campbell's sentence exceeds this statutory maximum.

While admitting that this Court's decisions under *Apprendi* require that the quantity of drugs involved be submitted to the jury and proved beyond a reasonable doubt, the courts below mistakenly concluded that the error in failing to do so here was harmless beyond a reasonable doubt (Opinion, App. 18a – 20a). They are mistaken for two reasons. First, while specific drug quantities of both cocaine (Count II) and heroin (Count III) were charged in the indictment, these quantities were not presented to the jury as elements of the offense and thus were not facts found beyond a reasonable doubt. The jury made no specific finding with respect to quantities. In fact, the jury was specifically instructed by the district court that the amount of controlled substances was not an element of either offense, and that the Government need only prove "a measurable amount of the controlled

substance" was possessed with intent to distribute it. (R. 484, TR. Vol. IV, 7/21/98, pp 88-89). This jury instruction distinguishes Campbell's case. Because of this instruction, the jury's verdict only means that a "measurable amount" was found, not the specific amount alleged in either of the substantive counts. There could have been no meaningful jury deliberations on the issue of drug quantity; in fact, the jury was told not to concern itself with this issue. Thus, contrary to the lower courts' reasoning, the jury's verdict cannot be interpreted (or assumed) to mean anything in regard to finding specific drug quantities.

Second, there are flaws in the lower court's analysis that once Campbell was found to be involved in the conspiracy, the jury had to have no doubt that the conspiracy involved more than the required amounts of controlled substances (Opinion, App. 19a – 20a). What is overlooked or misapprehended is that Count I of the indictment, alleging a conspiracy to possess and distribute controlled substances, does not recite any specific quantities. Also, while the two substantive counts each recite a specific quantity, it cannot be said with accuracy that the jury found these quantities or any specific amount whatsoever beyond a reasonable doubt because of the trial judge's instruction that the amount was not an element to be proven.[3] This is especially so since the evidence was neither overwhelming nor uncontroverted.

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[3] Regardless, even if the verdict could be somehow read as a finding of the drug quantities alleged in the indictment, the 34 kilogram amount calls for – under the USSG – a guideline range of 151 to 188 months (level 34) rather than the unjustifiably enhanced range of 235 to 293 months (level 38).

The *Apprendi* and *Blakely* principle prohibits enhancement of a sentence based on a judge's finding of drug quantity by a preponderance of the evidence. To be constitutionally appropriate, such an enhancement must be based on facts admitted by Petitioner or found by the jury – not "assumed" to be found or "impliedly" found or "probably" would have been found.

Furthermore, this issue should not be subject to harmless-error analysis. A constitutional error is harmless when "it appears beyond a 'reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The error complained of is sentencing beyond the statutory maximum and this "contributed to" and actually caused the result, i.e., a sentence 84 months over the allowable maximum.

Absent a specific jury finding or factual determination, the statutory range authorized by the jury's verdict is the default statutory maximum of 20 years; a sentence cannot exceed this number. Accordingly, the conclusion that the error - in failing to submit the drug quantity determination to the jury and in the district judge using the preponderance standard to make findings which enhanced the sentence - was harmless beyond a reasonable doubt is plainly wrong. Such an analysis is inappropriate in this context. Regardless, the error was very harmful and prejudicial, and it affected substantial rights because it influenced the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). Based on the *Apprendi* and *Blakely* principle, Campbell's substantial rights were affected when his sentence was (greatly) increased beyond that authorized by law. This made a huge difference in the outcome of the case. Thus, plain

sentencing error occurred, it was very harmful and Campbell must be resentenced under §841(b)(1)(C), which specifies no drug amount and sets a maximum sentence of imprisonment of 20 years.

The Court's granting of a writ of certiorari and the enforcement of the *Apprendi/Blakely* principle in Campbell's case is not only important to him but will serve to advise all courts as to correct sentencing parameters and to prevent the use of an unconstitutional sentencing procedure.

II.

The lower courts must be instructed to evaluate the cumulative prejudicial effect of multiple instances of deficient performance in determining ineffective assistance of counsel under the *Strickland* test.

Strickland v. Washington, supra, calls for a cumulative analysis of counsel's errors as part of the review process. The standard for reviewing a claim of ineffective assistance of counsel is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. Thus, the Court twice specifically refers to "errors" made by counsel; once for the

performance prong and once for the prejudice prong of the standard. Later in its opinion, the *Strickland* Court explains that to meet the prejudice prong of an ineffectiveness claim

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, at 466 U.S. at 694, 104 S. Ct. at 2068. Again, the Court refers to counsel's "errors". Certainly, this clear language calls for an analysis of all of the serious errors by counsel – in short, a cumulative analysis, *i.e.*, whether these errors, individually or together, resulted in deficient performance that prejudiced the defense.

The lower courts – generally and in this case - have erred in their analysis of ineffective assistance of counsel claims. When evaluating an instance of counsel's deficient performance, they decide that it alone does not show prejudice and thus the second prong of the test for ineffectiveness has not been met. But, prejudice can be shown by a number of events bound to have had a cumulatively negative effect on the outcome of the proceedings. In other words, to constitute ineffective assistance, there must be a reasonable probability that counsel's deficient performance caused the outcome to be different. An evaluation of all of the performance deficiencies (or errors) together can result in such a conclusion. Therefore, lower courts should be instructed to take this approach, i.e., to evaluate the cumulative effects of all instances of counsel's deficient performance in order to determine whether the prejudice was such as to

influence the outcome of the proceedings and thus constitute a violation of the Sixth Amendment right to the effective assistance of counsel.

In a multi-error situation, when a court acknowledges an error but terms it "harmless" or insufficient to change the outcome of the proceedings, the analytical flaw is readily apparent if the court is only looking at one error at a time, instead of the effect of all the errors in the aggregate. It is critical, when reviewing the proceedings, to consider the entire picture, not just part of it. Perhaps one error or another may not be enough, but one error builds upon another and the cumulative prejudice from all of them together can compel the conclusion that a fair trial was not afforded to a defendant.

In Campbell's case, the courts below did not consider the cumulative effect of the many instances of counsel's deficient performance. When they are analyzed cumulatively, it is apparent that the resulting prejudice was so severe that reversal is required. Considering the number and severity of all of the combined errors, they were bound to have had a substantial effect on the jury and adversely influenced the outcome of both the trial and sentencing proceeding. Certainly, the cumulative effect of these errors rendered the proceedings fundamentally unfair. See *id.* at 695-696.

It is vital that this Court grant certiorari because the courts below decided Campbell's case in a way that conflicts with the *Strickland* standard. Also, due to the very high number of both federal and state cases which involve ineffective assistance of counsel issues, it is necessary that this Court instruct the lower courts to evaluate the cumulative prejudice arising

from multiple claims of deficient performance within the context of the *Strickland* standard.

In Campbell's case, the major instances of trial counsel's deficient performance, which in the aggregate were so prejudicial as to adversely influence the outcome of the proceedings, are as follows:

A.

The failure to object and/or move for a mistrial regarding the prosecutor's remarks during closing argument to the jury, including vouching for government witnesses and bolstering their credibility, expressions of personal opinion and inflammatory emotional appeals.[4]

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[4] This issue was addressed and denied on direct appeal by the Sixth Circuit under the plain error standard, with Circuit Judge Clay dissenting. It is raised in this §2255 proceeding under the ineffective assistance of counsel standard. In the Order Adopting Magistrate Judge's Report and Recommendation, the district court rejected in part the Report and Recommendation as to the reasoning that there was no prosecutorial misconduct. (The court "disagrees with the Magistrate Judge's finding that there was no prosecutorial misconduct"(Order, App. 22 a); the court "shares Judge Clay's concerns regarding the prosecutor's conduct" and that "the case was an exceptionally close one" (Order, App.23a). The district court said that the majority of the Sixth Circuit panel (in the prior appeal) found no prosecutorial misconduct under the plain error standard of review. But, the panel "did not expressly state that the finding would have been the same under a less onerous standard of review" (Order, App. 26a). The district court went on to say:

> Thus, this Court leaves it to the Sixth Circuit to determine whether the Court is correctly interpreting the majority's opinion or reading too much into what the majority said. The Court simply notes that in the absence of a

There were numerous improper and highly prejudicial remarks made by the prosecutor when he addressed the jury during closing argument. Trial counsel failed to move for a mistrial. In each instance, trial counsel's omissions lacked a reasonable basis designed to further Campbell's interests, and they were so prejudicial to him as to have adversely affected the outcome of the case.

The court below decided that Campbell would not be able to show with a reasonable probability that "the result of the proceeding would have been different," *Strickland v. Washington*, 466 U.S. 668, 694 (1984), "[g]iven the overwhelming evidence establishing Campbell's guilt." (Opinion, App. 16a). In making this decision, the court overlooked or misapprehended its own case law. In *Blackburn v. Foltz*, 828 F. 2d 1177, 1186 (6th Cir. 1987), the court said: "Far from being an open and shut case, the fact that the evidence against *Blackburn* was not overwhelming is clearly established by the fact that the jury was unable to reach a verdict at the first trial." Here, Campbell was not convicted until the third trial since both the first and second trials had ended in hung juries (the third jury initially reported a deadlock but, after further instruction and deliberation, a guilty verdict was returned). Accordingly, the evidence in the

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> pronouncement from the Sixth Circuit on this case, it would have found prosecutorial misconduct for the reasons stated above and the additional reasons noted in Judge Clay's dissent. Instead, since it appears that the Sixth Circuit decided this issue adversely to Mr. Campbell, the Court reluctantly denies Petitioner's motion on this ground.

(Order, App. 26 a; emphasis added).

instant matter cannot be considered so overwhelming as to overcome trial counsel's failure to object to the prosecutor's misconduct.

Improper Vouching for Credibility of Government Witnesses

The essence of the government's case involved the testimony of individuals who had pled guilty and entered into plea bargains with the government in exchange for their cooperation. In closing argument, the prosecutor improperly attempted to vouch for these witnesses and bolster their testimony. He argued that these witnesses ought to be believed for three reasons: first, he felt they were telling the truth; second, their own attorneys would not have allowed them to present false testimony in exchange for reduced sentence consideration; and third, there were judges who would not afford them a downward departure for giving false testimony.

Specifically, the prosecutor spoke about the testimony of the drug dealers, who were serving prison sentences and had appeared at trial as government witnesses, with the expectation that they would receive downward adjustments in their sentences. The prosecutor said, ". . . there are defense lawyers and judges who are overseeing this process" (R.484, Government's closing argument, 7/21/98, TR Vol. IV, p.37), and that all of the government witnesses had "attorneys to protect their interest". (R.484, Government's closing argument, 7/21/98, TR Vol.IV, p.37). The prosecutor went on to say:

> And so in order to believe that these witnesses are coming into court just spinning any tail [sic] that the government wants them to spin, you have

> to remember the defense attorney's role. Are they going to be part of this kind of sinister plot to bring in false, perjured testimony against Robert Campbell? Are they going to allow that?
>
> The next question to ask. There are judges overseeing this process, too. These people, Orlando Bayless, Carol Bayless, Larry Anderson, Christopher Owens will be sentenced by federal judges. They are the ones who make the final call about whether these people have earned a downward departure from their sentencing guideline ranges. Are the judges going to be fooled by this testimony . . .

(R.484, Government's closing argument, 7/21/98, TR Vol.IV, pp.37-38). Defense counsel objected, but was overruled.[5]

The prosecutor then proceeded:

> [J]udges also oversee this process. ...[T]he ultimate decision on what sentence a person like Larry Anderson gets or Carol Bayless gets is made by a judge..., and you have to ask yourself is a judge somehow going to be fooled into giving somebody a downward departure

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[5]At that point, the district court suggested that after the government concluded its argument, defense counsel may wish to state its objections outside of the presence of the jury. (R.484, Government's closing argument, 7/21/98, TR Vol.IV, p.38). But, the record does not reflect any additional remarks or objections regarding this issue.

for testifying falsely against an innocent person?

(R.484, Government's closing argument, 7/21/98, TR Vol.IV, pp.38-39). In this unusual and highly prejudicial argument, the prosecutor asserted his personal opinion of the government witnesses' credibility. He told the jury that the government's witnesses were to be believed because they each testified under a plea bargain entered into with the help of their attorneys who would not allow them to be untruthful. And, he said there were judges overseeing the process who were going to give these witnesses downward departures if they were truthful and credible. This was a blatant and extreme instance of vouching for these government witnesses and bolstering their credibility. Because these four witnesses provided the crux of the government's proofs against Campbell, the impropriety was all the more significant.

The lower court appears to have overlooked its own caselaw on this point. In *United States v. Francis*, 170 F.3d 546 (6th Cir. 1999), holding that the cumulative effect of a prosecutor's improper vouching and bolstering of government witnesses mandated reversal and a new trial, the court made clear that a prosecutor may not imply that he or she is in a "special position" to ascertain whether the witness was testifying truthfully, which is improper vouching. Nor can a prosecutor imply that a witness' testimony is corroborated by evidence known to the government but not presented to the jury, which is improper bolstering. Here, the situation appears indistinguishable from *Francis*. The prosecutor's remarks in closing argument essentially told the jury that not only he, but also the witnesses' lawyers along with the judges "overseeing this process"

were vouching for their testimony. He said that the defense attorneys would not "allow" their clients/the witnesses to "bring in false, perjured testimony against Robert Campbell", and that the judges involved in the process would not "be fooled by this testimony" (R.484, Government's closing argument, 7/21/98, TR Vol. IV, pp. 37-39). This was improper argument and defense counsel should have objected and moved for a mistrial. See also, *United States v. Carroll*, 26 F.3d 1380, 1387-90 (6th Cir. 1994).

These improper remarks addressed the heart of the government's case, *i.e.*, the four witnesses that testified against Campbell. Such vouching and bolstering had to have had a great impact on how the jury viewed the case. In spite of the government's bald statement that the evidence was strong against him, Campbell had already gone through two trials without a conviction and – faced with such an unusual situation – the prosecutor deliberately injected these prejudicial remarks into the third trial (which initially also reported a hung jury). They likely made the difference between conviction and acquittal. Therefore, counsel's deficient performance in failing to object and move for a mistrial was so prejudicial that Campbell is entitled to a new trial "untainted by improper prosecutorial vouching." *Id.* at 1390. [6]

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[6] Circuit Judge Clay, in dissent from the Sixth Circuit's panel decision on direct appeal, was ". . . convinced that plain error occurred" (R. 546, Amended Opinion, p. 13) as a result of the prosecutor's arguments. He wrote: "Without question, the prosecutor improperly vouched by placing the prestige of the trial court behind the witnesses" (R. 546, Amended Opinion, p. 15). In reliance on *United States v. Carroll*, 26 F.3d at 1388, Circuit Judge Clay said that " . . . the prosecutor's statements about the court

Improper Expressions of Personal Opinion

Expressions of personal opinions by prosecutors are prohibited. *United States v. Young*, 470 U.S. 1, 8 (1985). Here, the prosecutor improperly expressed his personal opinion about the credibility of the government witnesses. This was another instance of vouching for these witnesses and bolstering their credibility. Specifically, the prosecutor said the following in reference to the government witnesses:

> They are people who have done wrong themselves. They speak with impure lips, and yet if we look carefully enough, if we work hard enough in arriving at the truth, we will find that even though many of them speak with impure lips, that the truth is that Robert Campbell was one of them.

(R.484, Government's closing argument, 7/21/98, TR Vol.IV, p.17). Then, referencing Carol Bayless, who was an important witness against Campbell, the prosecutor opined to the jury: "Yes, she said it with impure lips, but she spoke the truth that Robert Campbell was one of them." (R.484, Government's closing argument, 7/21/98, TR Vol.IV, p.40). In the government's rebuttal argument to the jury, the prosecutor continued asserting his personal opinions regarding government witnesses:

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improperly placed the prestige of the Court behind the government witnesses by implying that the trial court would not grant downward departures if the trial court did not believe them". (R. 546, Amended Opinion, p. 15). He then went on to conclude that the improper prosecutorial statements ". . . were sufficiently flagrant as to warrant reversal under the plain error doctrine". (R. 546, Amended Opinion, p. 16).

> I agree that they have incentive for coming in here, that they are working for something, that they are trying to earn themselves a downward departure, but you can tell that they are still telling the truth even though they have a reward, a pot of gold at the end for doing that.

(R.484, Government's rebuttal closing, 7/21/98, TR Vol.IV, p.60). Finally, again referencing the key witness, Carol Bayless, the prosecutor said: "Why would she do that if she's not telling the truth? Because the truth exists, and she's telling us what it is." (R.484, Government's closing argument, 7/21/98, TR Vol.IV, p.64).

These expressions of the prosecutor's personal opinions were repeated invitations for the jury to infer that the prosecutor had information confirming that the government witnesses told the truth about their involvement and that of Campbell. The inference was that the government had verified that information. But of course, the "verification" was not brought into the courtroom and the accused was unable to conduct cross examination about undisclosed evidence. Under the circumstances of this case, where credibility was such a crucial issue, it is certain that these remarks were unfairly prejudicial and contributed to the adverse outcome.

Inflammatory Emotional Appeals

In closing argument, the prosecutor impermissibly appealed to the juror's emotions. First, referencing the New York police officer who arrested Carol Bayless and discovered the controlled substances which began the investigation, the prosecutor said that they may never have discovered the conspiracy without him: "For my money, that guy deserves a medal."

(R.484, Government's closing argument, 7/21/98, TR Vol.IV, p.20). Then, referencing another key government witness, Orlando Bayless, the prosecutor said that he started dealing in drugs at age 14; and, "[i]f you ever want an example of what is happening in our inner cities, that is example number one, and for nine years, it's incredible that for nine years, Orlando Bayless got away with this. He was [sic] started when he was 14 and didn't get arrested until 23, for nine years he dealt in drugs and didn't get caught." (R.484, Government's closing argument, 7/21/98, TR Vol.IV, p.20).

These kinds of remarks are purely inflammatory and prejudicial rhetoric. They contravene the purpose of closing argument by making emotional appeals to the jury. They diverted the jury's attention from the singular decision that had to be made, *i.e.*, whether there was proof beyond a reasonable doubt of the guilt of the accused. The jury was obligated to make an objective evaluation of the evidence and applicable law. Such remarks, on the other hand, engendered hostility toward the accused and caused a verdict inspired by emotion or passion.

B.

Failure to Impeach Key Government Witness

Orlando Bayless, who had pled guilty to possession with attempt to distribute cocaine, was the key witness for the government at trial. Concerning an incident at the Red Roof Inn in Warren, Michigan on November 1, 1995, he testified that he had been collecting money to make a trip to New York to buy drugs (TR. Vol.II, 7/17/98, p.130-133). He said that the money seized that day from a motel room and a car

by government agents belonged to him, Dwight Campbell and Robert Campbell.

On cross examination, defense counsel failed to point out that in Orlando Bayless' initial statement to government agents on November 1, 1995, he told them ". . . he didn't know anything about the money in either room 214 or in the trunk of the Nissan Altima". See Report of Investigation, ¶11, by Special Agent Isaacson, dated November 6, 1995. He further told them ". . . he had not seen any money or given [Larry] Anderson any money". This information should have been used in cross examination of Bayless to impeach his direct testimony against Robert Campbell.

Furthermore, defense counsel failed to bring out on cross examination that when Bayless testified at the second trial, he said that Campbell had dropped off the money "wrapped up in plastic bag". (TR. 8/21/97, pp. 34-35; Tr. 8/22/97, p.89). This should have been contrasted to the trial testimony of a government witness, a police officer, who was part of the November 8, 1995, surveillance of the motel. The officer testified that the individual identified as Robert Campbell went from a vehicle in the parking lot to a motel room and back again, and he was not carrying anything either going to or from the motel room. (R. 475, Tr. Vol. III, 7/20/98, pp. 55, 61-62).

Clearly, these inconsistencies were "major," not "relatively minor" (Opinion, App. 14a). The government was relying on Bayless' testimony; its case was dependent upon his credibility. To convict Campbell, the government had to show that he brought money to the place where it was allegedly being collected for a drug purchasing trip. It was thus essential that Bayless be cross examined about his prior inconsistent statements, and thereby shown not to be

credible, especially because these inconsistencies dealt with a pivotal event in the case.

Indeed, at the second trial (in August, 1997), defense counsel did cross examine Bayless about the discrepancies between his trial testimony and his initial statement to the agents, and counsel specifically impeached him concerning his initial statement that he did not know who owned the money found in the motel room (TR. 8/22/97, p.88). The result was a hung jury. But at the third trial, defense counsel was silent about these discrepancies; the jury never learned about them, and Campbell was convicted.

Proper cross examination on these points would have been vital; it would have brought forth evidence exculpatory as to Campbell. Had the jurors heard the initial statement by Bayless denying any knowledge about the source or ownership of the money found in the motel room, coupled with the police officer's observation that Campbell was not carrying anything either going to or from the motel room, they could not have believed that Campbell actually had contributed any of the funds to the would-be drug transaction. By any measure, such impeachment of a critical government witness was a "major" point; effective assistance of counsel demanded that it be done.[7]

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[7] There is a great deal of legal authority for finding counsel deficient for failing to impeach key witnesses with prior inconsistent statements. See, e.g., *Moore v. Marr*, 254 F.3d 1235, 1241 (10th Cir. 2001) (noting that "counsel's failure to impeach a key prosecution witness is potentially the kind of representation that falls outside the wide range of professionally competent assistance") (internal quotation and citation omitted); *Driscoll v. Delo*, 71 F.3d 701, 710 (8th Cir.1996) (failure to question witness with prior inconsistent statement made to investigators

Because of the unique nature of this case, i.e., a third trial with two prior ones having ended in a hung jury, such impeachment would have been crucial. Bayless was the government's key witness and the believability of his testimony was necessary for any conviction. The significant inconsistencies would have been exculpatory as to Campbell; they should have been brought out before the jury. Since they went to the heart of the Government's theory of the case and impeached a critical Government witness, in a case without overwhelming evidence, they were anything but "minor details." In actuality they were of major proportion, contradicting the witness on a crucial event and raising serious questions as to his overall credibility.

The failure to present this important impeachment evidence to the jury was deficient performance. It could never be considered a legitimate trial strategy. Since there is a reasonable probability

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constituted deficient performance since there was "no objectively reasonable basis on which competent defense counsel could justify a decision not to impeach a state's eyewitness); *Tomlin v. Myers*, 30 F.3d 1235, 1238 (9th Cir. 1994) (defense counsel's performance deficient when counsel failed to challenge an in-court identification made by an eyewitness where the case "hinge[d] on an eyewitness's testimony"); *Harris v. Reed*, 894 F.2d 871,878 (7th Cir. 1990) (failure to call witnesses to contradict eyewitness identification of defendant was deficient performance); *Nixon v. Newsome*, 888 F.2d 112, 115-16 (11th Cir. 1989) (failure to impeach with prior inconsistent testimony "sacrificed an opportunity to weaken the star witness' inculpatory testimony"); *Blackburn v. Foltz*, 828 F.2d 1177, 1183-84 (6th Cir.1987) (counsel deficient where he failed to impeach an eyewitness with previous inconsistent identification testimony when "weakening [the witness'] testimony was the only plausible hope [the defendant] had for acquittal").

that such impeachment evidence would have caused a different outcome in the proceedings, it has to be looked upon as prejudicial to the defense.

C.

Trial Defense Counsel's Eliciting Prejudicial Testimony

In cross examining a DEA agent about the pivotal events of November 1, 1995, at the Red Roof Inn in Warren, Michigan, defense counsel inexplicably asked: "Did you feel the person in the Villager may have been somehow with or involved with the other guys in that room?" The agent responded: "Definitely." (R.475, TR Vol. III, 7/20/98, p.48). Such testimony, indicating "involvement" between Robert Campbell (the person in the Villager) and admitted drug traffickers (the other persons in that room), could only have inured to Campbell's detriment. Hearing this in the "context" of the questions before and after it made little difference. It was one more opportunity for a law enforcement witness to present the view that Campbell was "involved" with the conspirators.

In cross examining a police officer about the activities of the same date and place, defense counsel asked the officer where he had seen a picture of Robert Campbell. The officer responded that he had "seen a picture on a prior narcotic raid," in connection with the execution of a search warrant. (R.475, TR Vol.III, 7/20/98, p.61). This implied that Campbell was involved in a separate crime; it would have been inadmissible "other crimes" evidence if offered by the prosecution.

Then, during cross examination of a DEA agent, trial defense counsel asked him whether he was relying on the word of government witnesses Carol Bayless, Orlando Bayless, Larry Anderson and Christopher

Owens; the agent responded: "Not solely the fact of the people that you were discussing." (R.475, TR Vol.III, 7/20/98, p.97-98). This implied, of course, that there were other witnesses and other evidence which had not been presented at trial. Again, had this been elicited by the prosecution, it would have been improper.

Based on this record, absent a hearing and testimony from trial counsel, there is no basis to conclude that trial counsel was engaged in any kind of "legitimate strategy" when he elicited the three serious instances of prejudicial testimony. Separately and together, this testimony was improper and harmful to Campbell's defense.

D.

Defense Counsel's Prejudicial Remarks to the Jury

In his opening statement to the jury, trial defense counsel said the following:

> Perform the duties that your oath says that you will do. And whatever your verdict is, it is. If your verdict ultimately is guilty, so be it; it's guilty. That's what our system is about . . .

(R.477, TR Vol. II, 7/17/98, p.13). Continuing with this very unusual and prejudicial course, defense counsel then concluded his brief opening statement by saying:

> Don't be sidetracked on anything else. You are here to seek the truth. What the heck is the truth? Is Robert Campbell guilty? If he is, convict him. If he's not, let him go.

(R.477, TR Vol.II, 7/17/98, pp.14-15). Unbelievably, trial defense counsel renewed this theme in closing

argument and repeatedly told the jurors of his lack of concern for the verdict. First, he said:

> And honestly I, and you're going to think maybe I'm trying to sandbag you or something, I'm not, I'm not that concerned what the verdict is going to be. I'm really not concerned what the verdict is going to be. What I'm concerned about is how you, as jurors, reach whatever verdict you reach...

(R.484, TR Vol. IV, 7/21/98, p.45). Then, defense counsel told the jury:

> ... I'm not really, I'm not concerned about the verdict, I'm more concerned about how you get to it, and if you get to it beyond a reasonable doubt, then Mr. Campbell is going to be convicted, but if you can't get there, if you honestly say, you know, I've heard all of this, if you can honestly say it's not enough for me, what I heard in this court would not make me rely on that in the more important decisions in my life, that's why it's written that way.

(R.484, TR Vol.IV, 7/21/98, pp.52-53). Finally, he said:

> Now, the Government's case is not there. It's not there. That's why I don't care – I'm talking about the verdict – because if it is there, if you say it is there, then you're going to reach your verdicts that way and our system goes on and that's fine. If you say it's not there and you reach a verdict along those lines, you've done your duty, also. That's all the

> system can do, and all he can do is come to court and defend himself.

(R.484, TR Vol.IV, 7/21/98, p.58). That a defense attorney would say such things about his client borders on the incredible. Instead of arguing that a reasonable doubt, or doubts, should arise from the evidence, and that the evidence does not allow for a verdict of conviction, counsel implied the opposite – or at least that he himself was not concerned about the verdict and was not convinced of his client's innocence. This is especially egregious since he called Campbell to the stand in his own defense, and Campbell denied each of the allegations against him (R.497, TR Afternoon Session 7/20/98, pp.3-39).

CONCLUSION

Based upon the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each documents)

No. 03-1178

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT CAMPBELL,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

March 18, 2004, Argued
April 20, 2004, Decided
April 20, 2004, Filed

COUNSEL: ARGUED: Dennis J. Clark, PLUNKETT & COONEY, Detroit, Michigan, for Appellant.

Michael R. Mueller, UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee.

ON BRIEF: Dennis J. Clark, PLUNKETT & COONEY, Detroit, Michigan, for Appellant.

Michael R. Mueller, UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee.

JUDGES: Before: COLE and GILMAN, Circuit Judges; SCHWARZER, Senior District Judge. *

OPINION BY: RONALD LEE GILMAN

OPINION:

RONALD LEE GILMAN, Circuit Judge. Robert Campbell appeals from the district court's denial of his post-conviction motion to vacate his sentence. For the reasons set forth below, we AFFIRM the judgment of the district court.

I. BACKGROUND

After two mistrials as a result of hung juries, a third grand jury indicted Campbell on the following three counts: (1) conspiracy to possess controlled substances with the intent to distribute and conspiracy to actually distribute the controlled substances, all in violation of 21 U.S.C. §§ 841(a)(1) and 846; (2) aiding and abetting the possession of cocaine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; and (3) aiding and abetting the possession of heroin with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. In July of 1998, a jury found Campbell guilty on all counts. The district court sentenced Campbell to 324 months of imprisonment and 5 years of supervised release.

Campbell appealed, alleging numerous errors. In October of 2000, this court issued an amended opinion that affirmed his conviction and sentence by a 2 to 1 vote, with the dissent favoring a new trial because of the alleged prosecutorial misconduct that occurred during closing argument.

Campbell petitioned to vacate his sentence pursuant to 28 U.S.C. § 2255 in August of 2001. The case was referred to a magistrate judge, who issued a 30-page

Report and Recommendation (R&R) concluding that the motion should be denied. Over Campbell's objections, the district court adopted the R&R. Campbell then applied for a certificate of appealability as to nine issues, all of which the district court certified. In January of 2003, Campbell filed a timely notice of appeal.

II. ANALYSIS

A. Ineffective-assistance-of-counsel claims

Campbell asserts numerous ineffective-assistance-of-counsel claims on appeal. To prevail on these claims, he must establish that (1) his "counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for the deficiency, the outcome of the proceedings would have been different." Griffin v. United States, 330 F.3d 733, 736 (6th Cir. 2003). "The objective standard of reasonableness is a highly deferential one and includes a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Mason v. Mitchell, 320 F.3d 604, 616-17 (6th Cir. 2003) (quotation marks omitted). A "reasonable probability" has been defined by the Supreme Court as "a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

When deciding ineffective-assistance claims, courts need not address both components of the inquiry "if the defendant makes an insufficient showing on one." Id. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we

expect will often be so, that course should be followed." Id. These claims, as part of Campbell's motion to vacate his sentence under 28 U.S.C. § 2255, are reviewed de novo. Griffin, 330 F.3d at 736.

1. Ineffectiveness based upon alleged Speedy Trial Act violation

Campbell first argues that the district court erred in denying his claim that his counsel rendered ineffective assistance by not moving for a dismissal of the indictment based upon alleged violations of the Speedy Trial Act. 18 U.S.C. §§ 3161-74. The Act requires that a criminal defendant be brought to trial within 70 days after the filing of an indictment or an arraignment, whichever is later. 18 U.S.C. § 3161(c)(1). A retrial that follows a mistrial must start "within 70 days from the date the action occasioning the retrial becomes final . . . ." 18 U.S.C. § 3161(e). If a defendant is not brought to trial within 70 days, taking into account excludable time periods under the Act, the district court is obligated to dismiss the indictment on the defendant's motion. 18 U.S.C. § 3162(a)(2); United States v. Jenkins, 92 F.3d 430, 438 (6th Cir. 1996). The dismissal may be either with or without prejudice. Id.

Campbell alleges the following three violations of the Speedy Trial Act: (1) 83 days elapsed between the end of his first trial and the start of his second, (2) approximately 157 days elapsed between the second mistrial and the dismissal of the second indictment, and (3) 78 days elapsed between the dismissal of the second indictment and Campbell's arraignment on the third superseding indictment. The magistrate judge's R&R concludes that even if violations of the Speedy Trial Act

did occur, Campbell cannot demonstrate that he was prejudiced as required by Strickland. For the reasons that follow, we agree.

In his brief, Campbell asserts that the alleged violations of the Speedy Trial Act prejudiced him, but he provides little explanation and no authority to support his contentions. Campbell says that the prejudice "is obvious" and that "there clearly was prejudice suffered by Campbell." But he does not allege any specific prejudice, such as a witness becoming unavailable.

Under the Speedy Trial Act, courts must consider the following three factors when determining whether to dismiss an indictment with or without prejudice: "[1] the seriousness of the offense; [2] the facts and circumstances of the case which led to the dismissal; and [3] the impact of a reprosecution on the administration of [the Act] and on the administration of justice." 18 U.S.C. § 3162(a)(1). As explained in the R&R, "each of these factors would have counseled a dismissal without prejudice" in Campbell's case: Defendant was charged with involvement [in] an extensive, serious drug distribution conspiracy, for which he was sentenced to nearly 30 years' imprisonment. As to the second factor, the delays in defendant's case were not extensive and were occasioned in part by the complexity of the procedural issues involved, including two previous hung juries and a reindictment because of an improperly constituted grand jury. Further, there is no evidence of bad faith or any attempt to take advantage of the delay on the part of the prosecution. Finally, as to the third factor, defendant does not allege that he suffered any actual prejudice as a result of the delay, and there is no

allegation that the government engaged in any improper behavior which must be deterred in order to insure compliance with the Act. In these circumstances, any dismissal under the Act would have been without prejudice. We have no basis to fault the magistrate judge's analysis. Because Campbell cannot show that he was prejudiced by his trial counsel's failure to request dismissal for the alleged violations of the Speedy Trial Act, we affirm the district court's denial of relief to Campbell on this claim.

2. Ineffectiveness based upon failure to request a downward departure

Campbell next argues that his trial counsel rendered ineffective assistance by failing to request a downward departure at sentencing based upon Campbell's crime-free post-offense conduct and based upon the disproportionality between his sentence and those of his codefendants. Neither post-offense behavior nor disproportionality, however, is mentioned in the Sentencing Guidelines as a basis for departure. U.S. Sentencing Guidelines §§ 5K2.1-.21; see Koon v. United States, 518 U.S. 81, 96, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996) (noting that a sentencing court "must bear in mind the [Sentencing] Commission's expectation that departures based on grounds not mentioned in the Guidelines will be highly infrequent").

Under the Sentencing Guidelines, the sentencing court may impose a sentence below the guideline range where a mitigating circumstance exists "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different

from that described." U.S. Sentencing Guidelines Manual § 5K2.0 (quotation marks omitted). The R&R and the government both note that neither post-offense behavior nor disproportionality is mentioned in the Sentencing Guidelines as a basis for departure. See U.S. Sentencing Guidelines Manual § 5H1.1-.12 (listing "certain offender characteristics" relevant "to the determination of whether a sentence should be outside the applicable guideline range").

Campbell argues, however, that his lack of involvement in drug activity or other criminal conduct since his arrest rises to the level of "extraordinary post-offense behavior." But as this court noted in United States v. Biehl, some degree of presentence rehabilitation is to be expected from a penitent defendant, whether due to a true acceptance of responsibility or from one who simply wants to "put his best foot forward" at sentencing with hopes of receiving leniency from the sentencing court. Furthermore, in order to keep the temporary liberty defendant was given by delaying his sentence for almost three years, abiding by the fairly typical terms of his presentence release is not unexpected. As the First Circuit stated, "such predictable reactions, while laudable, fall shy of what we believe is necessary to take cases out of the heartland."1999 U.S. App. LEXIS 1222, Nos. 98-3318, 98-3346, 1999 WL 98600, at *3 (6th Cir. Jan. 25, 1999) (unpublished opinion) (quoting United States v. Sklar, 920 F.2d 107, 117 (1st Cir. 1990)). Because Campbell failed to show that he was prejudiced by his counsel's failure to move for a downward departure based upon either disproportionality or post-offense behavior, we affirm the district court's denial of relief to Campbell on this ground.

3. Ineffective assistance based upon trial proceedings

Campbell also argues that the following errors occurred during the trial that deprived him of his Sixth Amendment right to the effective assistance of counsel:

a. Failure to object to government witness's reference to organized crime

Campbell contends that his trial counsel was ineffective for failing to object and move for a mistrial after government witness Richard Carroll, a New York City police officer, testified that he was assigned to the Organized Crime Control Bureau at the time of his testimony. This testimony, according to Campbell, "implicitly linked Campbell to this criminal group which has [] strongly negative connotations in the minds of most citizen jurors." The R&R's thorough analysis of this issue explains why Campbell is not entitled to relief on this basis: Although defendant contends that this remark was "irrelevant, inflammatory and prejudicial," he does not state how he was prejudiced by this single reference to organized crime. Notably, the comment was in no way connected to his case, but was simply part of background testimony concerning the witness's current employment. Nowhere in his testimony did Carroll relate any of the allegations against defendant to organized crime, and he also testified that he was assigned to the Street Unit, not the Organized Crime Control Bureau, at the time he arrested [Campbell's] coconspirator Carol Bayless. Thus, there is not a reasonable probability that the comment influenced the jury's verdict in any manner. See, e.g., United States v. Catalano, 1992 U.S. App. LEXIS 20942, No. 91-50372, 1992 WL 212322, at *2 (9th Cir. Sept. 3, 1992) (per

curiam) (defendant not denied a fair trial by prosecutor's comments concerning organized crime where references were isolated and not inflammatory); United States v. Thirion, 813 F.2d 146, 156 (8th Cir. 1987) (defendant not denied a fair trial by question relating to whether defendant, an attorney, had represented an organized crime figure; the matter came up only once during the course of a lengthy trial and defendant's answer linked the client, and not the defendant, to organized crime) . . . .Because Campbell fails to show that this comment prejudiced him, we affirm the district court's denial of relief to Campbell on this issue.

b. Prejudicial remarks to the jury

Campbell argues that his trial counsel rendered ineffective assistance by making prejudicial remarks to the jury during his opening and closing statements. In his opening statement, for example, Campbell's counsel stated: Perform the duties that your oath says that you will do. And whatever your verdict is, it is. If your verdict ultimately is guilty, so be it; it's guilty. That's what our system is about . . . .Campbell contends that his counsel's comments evidenced a "lack of concern for the verdict" and that his counsel should have instead argued "that a reasonable doubt, or doubts, should arise from the evidence . . . ."

As noted in the R&R, these comments "do not amount to constitutionally ineffective assistance": On the contrary, counsel repeatedly emphasized the burden of proof, requiring the prosecutor to prove the charges against petitioner beyond a reasonable doubt. He also repeatedly stated that, in his view and for the reasons

he explained at length to the jury, the prosecutor had not met this burden. While counsel's discussion of the burden of proof was perhaps not as eloquent as it could have been, counsel at all times acted as an advocate for defendant and pressed defendant's case. In these circumstances, the comments of counsel do not amount to constitutionally ineffective assistance. We agree, and accordingly affirm the district court's denial of relief to Campbell on this ground.

c. Failure to propose defense-theory instruction

Campbell argues that his counsel's failure to request a jury instruction explaining his theory of the case amounted to the ineffective assistance of counsel. In his argument, however, Campbell does not demonstrate how he was prejudiced by this omission. The R&R explains that Campbellcannot show that he was prejudiced by counsel's failure because his theory was adequately conveyed to the jury by the Court's instructions on the elements of the government's charges and the burden of proof. Defendant's theory of the case was a simple denial of involvement in the conspiracy. The R&R's reasoning is persuasive and we therefore affirm the district court's denial of relief to Campbell on this claim.

d. Failure to call character witnesses

Campbell contends that his case presented the jury with a classic credibility question because the government asserted that he was involved in drug activity and Campbell denied those allegations. He argues that character witnesses "testifying to [his] reputation for truthfulness and veracity would have

been significant." According to Campbell, character witnesses were available to testify on his behalf, but his trial counsel failed to call them. Campbell concludes that this failure amounts to the ineffective assistance of counsel.

Both the R&R and the government note, however, that Campbell failed to provide any information regarding "what witnesses should have been examined more fully or what additional witnesses should have been called." Consequently, Campbell cannot rebut the strong presumption that his attorney's actions were the product of sound trial strategy. Strickland v. Washington, 466 U.S. 668, 690, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) ("The court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). We accordingly affirm the district court's denial of relief to Campbell on this basis.

e. Eliciting of prejudicial testimony

Campbell argues that his trial counsel rendered ineffective assistance by eliciting prejudicial testimony from three government witnesses on cross-examination. During the cross-examination of a Drug Enforcement Agency (DEA) agent, Campbell's trial counsel asked whether the agent felt that Campbell "may have been somehow with or involved with" the other members of the alleged conspiracy. Campbell contends that such testimony indicating a connection between Campbell and "admitted drug traffickers . . . could only have inured to Campbell's detriment." With regard to this testimony, the R&R notes that the

questions preceding and following the challenged question show that Campbell's trial counsel was attempting to cast doubt upon the DEA agent's belief: Counsel was trying to show that the agent's belief was not credible given that he did not have the [car that Campbell was traveling in] followed by another agent when it left the motel parking lot [where the other coconspirators were]. Counsel asked a number of questions establishing this fact, as well as the fact that the agent did not see defendant carrying anything either to or from the room in which the other conspirators were apparently conducting the transaction.

Campbell next argues that his counsel's cross-examination of a police officer was improper because an inquiry as to where the police officer had previously seen a picture of Campbell led the officer to respond that he had "seen a picture on a prior narcotic raid." This answer is most likely not what counsel expected, but, as the R&R notes, the question was part of a legitimate strategy on the part of Campbell's attorney to question the officer about his observations and identification of Campbell.

Finally, Campbell argues that his defense counsel's question to a DEA agent about whether he was "relying on the word of government witnesses Carol Bayless, Orlando Bayless, Larry Anderson, and Christopher Owens" was improper given that the DEA agent answered: "Not solely the fact of the people that you were discussing." Campbell contends that this answer implied that there were other witnesses and other evidence that had not been presented at trial and that such evidence would have been deemed improper

had it been elicited by the prosecution. Again, we agree with the R&R's analysis, which is as follows: This isolated statement came after counsel elicited repeatedly from the agent that he was, in fact, relying primarily on the word of the government witnesses, and that he had no independent evidence, through surveillance, to indicate that the defendant was involved in the crime. In light of counsel's successful cross-examination, it is difficult to see how this isolated statement would have, in defendant's view, [led] the jury to conclude that there were other witnesses who did not testify. The R&R reasoned overall that while counsel's questions to the witnesses may illustrate a classic example of the first rule of cross-examination; don't ask a question unless you know what the answer will be, the only issue for the Court is whether counsel's conduct in asking the question fell below an objective standard of reasonableness. We agree with the R&R's conclusion that Campbell has failed to show that his counsel's performance was deficient and therefore affirm the district court's denial of relief to Campbell on this issue.

f. Failure to impeach witness Orlando Bayless

Campbell contends that his trial counsel's failure to impeach Orlando Bayless--a government witness and one of Campbell's coconspirators--constituted the ineffective assistance of counsel. He argues that his trial counsel should have impeached Bayless regarding inconsistencies between Bayless's testimony at Campbell's second and third trials concerning the amount of money Campbell used to purchase the drugs. Campbell also contends that his trial counsel should have impeached Bayless with the statement that

Bayless initially gave to the police, in which he denied any knowledge of the money seized by the police.

We agree with the *R&R*'s analysis and conclusion on this issue, which is as follows: It is true that counsel could have chosen to attack Bayless through the inconsistencies in his testimony. However, the inconsistencies identified by defendant were relatively minor, addressing whether defendant had brought $ 70,000 or $ 80,000 to the motel. Counsel instead chose to focus his attack on Bayless on the substantial sentence reduction Bayless was hoping to receive in exchange for his testimony, and on Bayless's significant drug related activity. This was a reasonable trial strategy. Further, defendant is unable to establish that he was prejudiced by counsel's failure to question Bayless about these minor inconsistencies. Accordingly, we affirm the district court's denial of relief to Campbell on this issue.

g. Failure to object to alleged prosecutorial misconduct

Campbell argues that his trial counsel's failure to object to several instances of alleged prosecutorial misconduct during the government's closing argument and to move for a mistrial based upon that alleged misconduct constituted the ineffective assistance of counsel. Specifically, Campbell contends that the prosecutor improperly (1) vouched for the credibility of the government's witnesses, (2) expressed his personal opinion as to Campbell's guilt, and (3) made inflammatory emotional appeals to the jury.

Campbell raised these identical claims as substantive issues in his direct appeal. A prior panel of this court

held that the prosecutor's remarks were isolated and that "even if the closing argument improperly appealed to the emotions of the jury, the error, if any, was not plain because there was ample evidence in the record to convict Robert." United States v. Campbell, 2000 U.S. App. LEXIS 27403, Nos. 98-1782, 98-2174, 2000 WL 1597858, at *4 (6th Cir. Oct. 19, 2000) (unpublished opinion). In Campbell's § 2255 proceedings, the magistrate judge analyzed the claim of ineffective assistance of counsel based upon the alleged prosecutorial misconduct and noted that this court had rejected the substantive claims on direct appeal. Given this court's resolution of these claims, the R&R concluded that Campbell could not show that his counsel was deficient or that he was prejudiced by his counsel's failure to object or move for a mistrial.

The district court disagreed with the magistrate's R&R on this point, rejecting "that portion of the R&R that states the prosecutor's statements did not rise to prosecutorial misconduct." "In the absence of a pronouncement from the Sixth Circuit on this case," the district court said that it "would have found prosecutorial misconduct."

We need not resolve this difference of opinion between the magistrate judge and the district judge, especially because we do not read this court's prior decision as absolving the prosecutor of any misconduct. The earlier decision on this issue is instead based upon the isolated nature of the remarks and the lack of prejudice to Campbell. To succeed on his ineffective assistance of counsel claim, Campbell must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." Strickland v. Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). This he has been unable to do. In the case before us, no less than four members of the alleged drug conspiracy testified against Campbell at trial. Given the overwhelming evidence establishing Campbell's guilt, we believe that he would not have been able to show that, but for his attorney's failure to object to the prosecutor's alleged misconduct, the result would have been different. We accordingly affirm the district court's denial of relief to Campbell on this issue.

h. Ineffective assistance based upon the cumulative effect of all alleged errors

Campbell's final ineffective-assistance-of-counsel claim is that the "numerous errors concerning matters of great importance . . . had to have [had] a substantial effect on the jury." We acknowledge that trial-level errors that would be considered harmless when viewed in isolation of each other might, when considered cumulatively, require reversal of a conviction. United States v. Parker, 997 F.2d 219, 221 (6th Cir. 1993). But we also agree with the R&R that "the accumulation of non-errors cannot collectively amount to a violation of due process." See McKinnon v. Ohio, 1995 U.S. App. LEXIS 32120, No. 94-4256, 1995 WL 570918, at *12 (6th Cir. Sept. 27, 1995) (unpublished opinion) (quoting United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("Cumulative-error analysis should evaluate only the effect of matter determined to be in error, not the cumulative effect of non-errors."); United States v. Lumpkin, 192 F.3d 280, 290 (2d Cir. 1999) ("The accumulation of non-errors does not warrant a new trial.").

Because Campbell has not shown that any of the alleged instances of ineffective assistance of counsel deprived him "of a fair trial, a trial whose result is reliable[,]" Strickland, 466 U.S. at 687, he cannot show that the accumulation of these non-errors warrant relief. We therefore affirm the district court's judgment on this issue.

B. Apprendi claim

In a completely different line of attack, Campbell argues that his sentence violates the rule established by the Supreme Court in Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). In Apprendi, the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. This court held in United States v. Page, 232 F.3d 536, 542-43 (6th Cir. 2000), that Apprendi also applies to the determination as to the amount of drugs necessary to impose the mandatory minimum sentences provided in 21 U.S.C. 841(b)(1). Apprendi does not require that a precise amount of drugs be found by the jury; it suffices that the jury finds beyond a reasonable doubt the minimum amount specified in the indictment and that "the ultimate sentence does not exceed the statutory maximum for this amount." United States v. Zidell, 323 F.3d 412, 429 (6th Cir. 2003).

The government argues that Campbell failed to raise his Apprendi claim either in the trial court or on direct appeal. But Campbell was tried and sentenced in 1998 before Apprendi and its precursor, Jones v. United

States, 526 U.S. 227, 243 n.6, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999) (stating Apprendi's general rule), were decided. This court has noted that a defendant's objection to the quantity of drugs attributed to him might suffice to preserve an Apprendi challenge for appeal. United States v. Stewart, 306 F.3d 295, 311 (6th Cir. 2002).

The present case presents a different procedural posture, however, in that Campbell is arguing that by timely objecting on direct appeal to the drug quantities, he preserved his Apprendi claim for his § 2255 proceedings. Apprendi was decided in June of 2000, after oral argument in Campbell's direct appeal, but a few months before this court issued its decision. Campbell therefore could have cited Apprendi as supplemental authority while his direct appeal was pending. Fed. R. App. P. 28(j) ("If pertinent and significant authorities come to a party's attention after the party's brief has been filed-- or after oral argument but before decision--a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations.") (Emphasis added). He in fact failed to do so.

Because our ultimate disposition of this issue is not dependent on whether or not Campbell preserved his Apprendi challenge, we will assume without deciding that he did. The parties do not dispute that if Apprendi applies to this case, then the quantity of drugs Campbell allegedly possessed should have been submitted to the jury and proved beyond a reasonable doubt. Despite this, Apprendi errors are considered to be trial-type errors subject to harmless-error review. United States v. Copeland, 321 F.3d 582, 603 (6th Cir.

2003). Thus, if the government "can demonstrate beyond a reasonable doubt that the jury would have found the defendant liable for the drug quantity at issue in sentencing, this court must consider the error harmless and sustain the defendant's sentence." Id.

Campbell's 324-month sentence was subject to the enhanced sentencing range governed by 21 U.S.C. § 841(b)(1)(A), which increases the range of a defendant's sentence from no mandatory minimum and a 20-year maximum prescribed in 21 U.S.C. § 841(b)(1)(C) to a mandatory minimum of 10 years and a maximum of life if the conviction involves more than one kilogram of heroin or more than five kilograms of cocaine. The increase in Campbell's sentencing range, therefore, was attributable to the amounts of heroin and cocaine involved in the conspiracy. We agree with the R&R's conclusion that once the jury found beyond a reasonable doubt that Campbell was involved in the conspiracy, "it could have had no doubt that the conspiracy involved more than one kilogram of heroin and more than five kilograms of cocaine."

The police seized 34 kilograms of cocaine and 2 kilograms of heroin on a single occasion from one of Campbell's coconspirators, to say nothing of the 150 kilograms or more of cocaine and heroin proven to be involved in the overall conspiracy. "If this jury was going to convict [Campbell] at all--which it plainly did--there is simply no way on this record that it could have failed to find that he was conspiring to distribute" one kilogram or more of heroin and five kilograms or more of cocaine. United States v. Nance, 236 F.3d 820, 826 (7th Cir. 2000). Accordingly, we affirm the district

court's denial of relief to Campbell on his Apprendi claim.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

Footnotes

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

No. 01-73211 (civil), No. 95-81192 (criminal)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

ROBERT CAMPBELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

266 F. Supp. 2d 587; 2003 U.S. Dist. LEXIS 62

January 6, 2003, Decided

COUNSEL:
Robert Campbell, PLAINTIFF, Pro se, Cumberland, MD USA.

William J. Richards, United States Attorney's Office, Detroit, MI USA.

Amy B. Hartmann, United States Attorney's Office, Detroit, MI USA.

JUDGES:
ARTHUR J. TARNOW, UNITED STATES DISTRICT JUDGE.

OPINION BY:
ARTHUR J. TARNOW

OPINION:

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION [656] n1

Petitioner Robert Campbell filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 on August 20, 2001. The Magistrate Judge filed a Report and Recommendation (R&R) on January 25, 2002, recommending that this Court deny Petitioner's motion. Petitioner filed Objections to the R&R on February 7, 2002.

A district court reviews a Magistrate Judge's R&R de novo when objections are made. See Fed. R. Civ. P. 72(b). The reviewing court may "accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." Id.

After de novo review, the Court finds that most of Plaintiff's objections are without merit. However, the Court disagrees with the Magistrate Judge's finding that there was no prosecutorial misconduct. The disagreement, though, has no impact on the outcome of Mr. Campbell's motion, because the Court agrees with the Magistrate Judge's ultimate disposition of the prosecutorial misconduct claim. Therefore, the Court ADOPTS the result of each recommendation in the R&R, but REJECTS that portion of the R&R that states the prosecutor's statements did not rise to prosecutorial misconduct.

On direct appeal before the Sixth Circuit, Mr. Campbell raised several issues, including prosecutorial

misconduct. The panel, in a two to one decision, denied his appeal on all grounds. Judge Clay dissented in part because he believed the prosecutor committed misconduct, which rose to the level of plain error. United States v. Campbell, 234 F.3d 1270, [published in full-text format at 2000 U.S. App. LEXIS 27403] **8 (6th Cir. Oct. 19, 2000) (unpublished table disposition) ("Having determined that the prosecutorial statements were improper, I believe that the comments were sufficiently flagrant as to warrant reversal under the plain error doctrine."). Judge Clay was particularly troubled that the prosecutor improperly vouched for the co-conspirators' testimony. 2000 U.S. App. LEXIS 27403, at *22 ("Without question, the prosecutor improperly vouched by placing the prestige of the trial court behind the witnesses.").

This Court shares Judge Clay's concerns regarding the prosecutor's conduct. The case was an exceptionally close one, as evidenced by two prior hung juries, and the testimony of Mr. Campbell's co-conspirators was the main evidence linking him to the crime. In his closing statement, in order to bolster the co-conspirators' testimony, the prosecutor argued:

There are judges overseeing this process too. These people, Orlando Bayless, Carol Bayless, Larry Anderson, Christopher Owens will be sentenced by federal judges. They are the ones who make the final call about whether these people have earned a downward departure from their sentencing guideline ranges. Are the judges going to be fooled by this testimony . . .

Judge Tarnow will tell you in his explanation of how the sentence guidelines work that the ultimate decision on what sentence a person like Larry Anderson gets or Carol Bayless gets is made by a judge, an independent judge, not me, not anybody with the executive branch of government, and independent judge, and you have to ask yourself is a judge somehow going to be fooled into giving somebody a downward departure for testifying falsely against an innocent person? There's another check and balance in the process to make sure the whole process has integrity.

(Trial Trans., Vol IV, pg 37-39). This entire line of argument was highly improper. In United States v. Carroll, 26 F.3d 1380, 1389 (6th Cir. 1994), the court stated:

In the present case, the prosecutor blatantly implied that the Patrick's plea agreements ensured that the witnesses were truthful; the prosecutor did not give the jury any inkling that the government has no independent means of discerning truthfulness. Further, the prosecutor placed the prestige of the government, and even of the court, behind the credibility of the Patricks, by stating that, if the government or the judge did not believe that the witnesses were being truthful, the witnesses would be in jeopardy. This implied to the jury that the government and the court were satisfied that the witnesses were truthful. This constitutes improper vouching.

Because Petitioner's counsel did not object to these prosecutor's statements at the time of the argument, n2 the issue before the Sixth Circuit on direct appeal was whether there was prosecutorial misconduct, and if so,

whether the misconduct rose to the level of plain error. Here, on collateral review, the issue is whether Petitioner's counsel was ineffective for failing to object to the prosecutorial misconduct. To demonstrate ineffective assistance of counsel, the Petitioner must show that: (1) counsel's performance undermined the proper functioning of the adversarial process (deficiency); and (2) and "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt" (prejudice). Strickland v. Washington, 466 U.S. 668, 687, 695, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

There is no question that counsel's failure to object subjected Mr. Campbell to a "much more onerous" standard of review on appeal. See Burns v. Gammon, 260 F.3d 892, 898 (8th Cir. 2001) ("Plain error review is much more onerous for both the direct appeal defendant the habeas corpus petitioner than is review for a defendant or petitioner pursuing a properly preserved prosecutorial misconduct claim."); United States v. Chavez, 193 F.3d 375, 379 (5th Cir. 2000) ("counsel's failure to object certainly diminished Chavez's possibility of reversal on direct appeal."). The failure to object, then, could rise to ineffective assistance of counsel. See Burns, 260 F.3d at 898 (finding ineffective assistance of counsel because counsel's failure to object to prosecutorial misconduct constituted a deficient performance which prejudiced his client because the result at trial or on appeal likely would have been different).

However, the Magistrate Judge asserts that since a majority of the Sixth Circuit panel found there was no prosecutorial misconduct, Petitioner cannot

demonstrate prejudice. The Magistrate Judge acknowledges that the majority's finding was under the plain error standard of review, but he states that "it is clear from the language used by the court that it found no error, plain or otherwise." (R&R at 18).

This Court agrees with the Magistrate Judge on this point. After a careful reading of the majority's opinion, it appears they did not find prosecutorial misconduct under any standard of review. They state, "the prosecutor's remarks were isolated and were made in the context of responding to the defendant's suggestion that the witnesses were required to incriminate Robert in order to get the prosecutor to ask for a sentence reduction." Campbell, 2000 U.S. App. LEXIS 27403 at *23. On the other hand, the Sixth Circuit did not expressly state that the finding would have been the same under a less onerous standard of review. 2000 U.S. App. LEXIS 27403 at *11, [WL] at **4 ("the error, if any, was not plain."). Thus, this Court leaves it to the Sixth Circuit to determine whether the Court is correctly interpreting the majority's opinion or reading too much into what the majority said. The Court simply notes that in the absence of a pronouncement from the Sixth Circuit on this case, it would have found prosecutorial misconduct for the reasons stated above and the additional reasons noted in Judge Clay's dissent. Instead, since it appears that the Sixth Circuit decided this issue adversely to Mr. Campbell, the Court reluctantly denies Petitioner's motion on this ground.

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation [656] is REJECTED IN PART only as to the reasoning that there was no prosecutorial misconduct. As to all other

issues, including the resolution of the prosecutorial misconduct ground, the Report and Recommendation is ADOPTED IN PART. Therefore, Mr. Campbell's § 2255 motion [616] is DENIED.

/s/
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

Dated: January 6, 2003

Footnotes

n1 Law Clerk Amy Harwell provided quality research assistance.

n2 Actually, although not noted by the appellate court, defense counsel did object to the prosecutor's argument (Trial Trans., Vol IV, pg 38). The trial judge overruled the objection at that point, but ruled defense counsel could raise his objection after the prosecutor finished his closing statement, outside the presence of the jury (Id.). There is nothing in the record to indicate that defense counsel raised the objection later. On direct review, the Sixth Circuit did not address what effect this objection had on the standard of review to be applied to Petitioner's case.

No. 03-1178

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT CAMPBELL, also known as Rudy,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

May 17, 2004, Filed

ORDER

Before COLE, GILMAN, Circuit Judges, SCHWARZER, Senior District Judge.*

Upon consideration of the petition for rehearing filed by the Appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Footnotes

* The Honorable William W. Schwarzer, Senior United States District Court Judge for the Northern District of California, Sitting by designation.

(2)
Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ROBERT CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

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CASE NO. 95-CR-81192
01-CV-73211-DT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

ROBERT CAMPBELL,
Defendant/Movant.

Filed January 25, 2002

JUDGE ARTHUR J. TARNOW
MAGISTRATE JUDGE PAUL J. KOMIVES

REPORT AND RECOMMENDATION

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I. RECOMMENDATION: The Court should deny defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

II. REPORT:

A. Procedural Background

Defendant/movant Robert Campbell is a federal prisoner confined at the Federal Correctional Institution in Cumberland, Maryland. Defendant was charged in this Court in a multiple count, multiple person indictment with various drug offenses. After two trials which ended in hungjuries, defendant was convicted following his third trial of conspiracy to possess with intent to distribute controlled substances, 21 U.S.C. §§ 841(a), 846; and two counts of possession with intent to distribute controlled substances and aiding and abetting the same, 18 U.S.C. § 2, 21 U.S.C. § 841(a)(1). Defendant was sentenced to a term of 324 months' imprisonment.

Defendant appealed his conviction and sentence to the United States Court of Appeals for the Sixth Circuit. He raised the following claims: (1) prosecutorial misconduct; (2) improper admission of videotape evidence and notes from an interviewing police officer; (3) improper admission of an attorney's testimony; (4) improper jury instructions; (5) violation of the Speedy

Trial Act and ineffective assistance of counsel by counsel's failure to assert this claim prior to trial; (6) insufficient evidence; and (7) improper determination of drug quantity at sentencing. The court of appeals found no merit in these claims, and affirmed the conviction and sentence. See United States v. Campbell, No. 98-2174, 2000 WL 1597858, at *3-*6 (6th Cir. Oct. 19, 2000).

On August 20, 2001, defendant, through counsel, filed this motion to vacate his sentence pursuant to 28 U.S.C. § 2255. As grounds for relief, defendant raises 13 instances of ineffective assistance of counsel: (1) failure to move for dismissal under the Speedy Trial Act (Ground 1); (2) failure to establish grounds for a downward departure at sentencing (Ground 111); (3) failure to object to a reference to organized crime (Ground IV.A); (4) prejudicial remarks to the jury (Ground IV.B); (5) failure to propose a defense theory jury instruction (Ground IV.C); (6) failure to call character witnesses (Ground IV.D); (7) eliciting of prejudicial testimony (Ground IV.E); (8) failure to object to jury instructions (Ground IV.F); (9) failure to impeach witness Orlando Bayless (Ground IV.G); (10) failure to object to the prosecutor's improper remarks during closing argument (Ground V); (11) failure to adequately object to the admission of a videotaped statement and admission of testimony from the police officer who took the statement (Ground VI); (12) failure to object to testimony by the attorney for witness Carol Bayless (Ground VII); and (13) failure to object to erroneous jury instructions (Ground VIII). Defendant also contends that he was denied a fair trial by the cumulative effect of counsel's errors (Ground IX). Finally, defendant raises one claim not based on the ineffective assistance of counsel: his sentence violates

the rule of Apprendi v. New Jersey, 530 U.S. 466 (2000) (Ground II).

The government filed its response on December 17, 2001. The government argues that many of defendant's ineffective assistance of counsel claims are barred by his failure to raise the claims on direct appeal, or by the court of appeals's rejection of the claims. The government also argues that the remaining ineffective assistance claims are without merit, and that Apprendi does not apply retroactively to this conviction. On January 22, defendant filed a reply to the government's response. For the reasons that follow, the Court should deny defendant's motion to vacate his sentence.

B. Procedural Default and Law of the Case

1. Procedural Default

The government contends that many of defendant's ineffective assistance of counsel claims are barred because he did not raise them on his initial appeal. Thus, the government argues, the claims are procedurally defaulted. The Court should disagree. Generally, the court of appeals will not consider ineffective assistance of counsel claims on direct appeal. Rather, the appropriate vehicle for raising an ineffective assistance of counsel claim is a § 2255 motion in the trial court. See United States v. Long, 190 F.3d 471, 478 (6th Cir. 1999); United States v. Pruitt, 156 F.3d 638, 646 (6th Cir. 1998). Thus, an ineffective assistance of counsel claim is "properly raised for the first time in [a] § 2255 motion." Hall v. United States, No. 97-5936, 1998 WL 887276, at *2 (6th Cir. Dec. 9, 1998); see also, Hunter v. United States, 160 F.3d 1109,

1115 (6th Cir. 1998) (addressing ineffective assistance claim "brought for the first time in a section 2255 proceeding."), Accordingly, the Court should conclude that defendant's ineffective assistance of counsel claims are not procedurally defaulted.

2. Law of the Case

The government also contends that those ineffective assistance claims which are premised upon substantive issues decided by the Sixth Circuit in defendant's direct appeal are barred by the law of the case doctrine. The law of the case doctrine, which is applicable in criminal proceedings, prohibits a lower court from redeciding issues already determined by a higher court in the same case. See United States v. Moored, 38 F.3d 1419, 1421-22 (6th Cir. 1994). Thus, issues which were addressed by the Sixth Circuit and decided against a defendant on direct appeal may not be relitigated in a § 2255 proceeding. See DuPont v. United States, 76 F.3d 108, 110 (6th Cir. 1996); Gonzales v. United States, 929 F. Supp. 252, 255 (E.D. Mich. 1996) (Gadola, J.) (citing Stephen v. United States, 496 F.2d 527, 528-29 (6th Cir. 1974)).

To the extent that the government argues defendant's ineffective assistance claims are barred in toto, the government's argument is without merit. "An ineffective assistance claim is analytically distinct from the substantive claim underlying it." Bailey v. Nagle, 172 F.3d 1299, 1304 n.8 (11th Cir. 1999); see, e.g., Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (noting that ineffective assistance claim based on counsel's failure to file motion to suppress was distinct from the underlying Fourth Amendment claim). Thus,

the law of the case doctrine does not bar the Court from considering defendant's ineffective assistance claims. Cf. Hunter, 160 F.3d at 1115 (considering ineffective assistance of counsel claim even though underlying substantive claim was procedurally defaulted, and thus not considered).

However, to the extent that the Sixth Circuit actually decided issues relevant to the ineffective assistance of counsel claims, the Court is bound by those determinations. Thus, for example, the Sixth Circuit's determination that a particular comment by the prosecutor was not improper is binding on this Court, and will inform the analysis of whether counsel was ineffective for failing to object to that comment.

C. Legal Standard

The substantive provisions of § 2255, which were not altered by the recently enacted Antiterrorism and Effective Death Penalty Act of 1996, provide that a federal prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence." 28 U.S.C. § 2255 para. 1. Thus, a defendant may be entitled to § 2255 relief if his conviction or sentence violates either the Constitution or a federal statute. However, In order to obtain relief under § 2255 on the basis of a nonconstitutional--i.e., statutory or rule-error, the record must reflect a fundamental defect in the proceedings which inherently causes a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure. Reed v.

Farley, 512 U.S. 339, 348 (1994) (Ginsburg, J.); id. at 355-56 (Scalia, J.); United States v. Todaro, 982 F.2d 1025, 1028 (6th Cir. 1993) (per curiam). As the Seventh Circuit explained:

Where "mere statutory violations are at issue," as here, the Supreme Court has recently held that § 2255 can only avail a petitioner if the alleged error spawned a "'fundamental defect which inherently results in a complete miscarriage of justice.'" Federal courts lack the power under § 2255 to rectify errors that fall short of "vitiat[ingl the sentencing court's jurisdiction or are otherwise of constitutional magnitude."

Broadway v. United States, 104 F.3d 901,903 (7th Cir. 1997) (quoting, respectively, Reed, 512 U.S. at 348 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)) (citations omitted), and Guinan v. United States, 6 F.3d 468, 470 (7th Cir. 1993)) (citations omitted) (alteration in original).

D. Ineffective Assistance of Counsel Claims

1. Legal Standard

The Sixth Amendment right to counsel and the corollary right to effective assistance of counsel protect the fundamental right to a fair trial. See Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish the ineffective assistance of counsel, defendant must show that: (1) counsel's errors were so serious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) counsel's deficient performance prejudiced the defense. Id. at 687. These two components are mixed questions of law

and fact. See id. at 698. Further, "[t]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. If "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . , . that course should be followed." Id.

With respect to the performance prong of the Strickland inquiry, a strong presumption exists that counsel's behavior lies within the wide range of reasonable professional assistance. See id. at 689; O'Hara v. Wigginton, 24 F.3d 823, 828 (6th Cir. 1994). "[D]efendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (citation omitted). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. With respect to the prejudice prong, the reviewing court must determine, based on the totality of the evidence before the factfinder, "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

As noted above, defendant raises 13 separate claims of ineffective assistance of counsel. For ease of analysis, rather than addressing them in the order presented by defendant, I have grouped the claims into four general areas: pre-trial, trial, jury instructions, and sentencing.

2. Pre-Trial. Failure to Raise Speedy Trial Act Claim (Ground I)

Petitioner first contends that counsel was ineffective for failing to move to dismiss the indictment for violation of the Speedy Trial Act. The Sixth Circuit did not address the merits of the underlying substantive claim, concluding that the issue was waived and that petitioner's ineffective assistance claim based on the Speedy Trial Act should by brought in a § 2255 motion. See Campbell, 2000 WL 1597858, at *6. Thus, none of the issues relevant to this claim have been decided already by the Sixth Circuit.

The Speedy Trial Act requires that a criminal defendant be brought to trial within 70 days of either the filing of an indictment or an arraignment, whichever is later. See 18 U.S.C. § 3161(c)(1). If a defendant is retried following a judge's declaration of a mistrial, the retrial must begin "within 70 days from the date the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e). If a defendant is not brought to trial within 70 days, taking into account excludable periods under the Act, the indictment "shall be dismissed on motion of the defendant," either with or without prejudice. 18 U.S.C. § 3162(a)(2); see also, United States v. Jenkins, 92 F.3d 430, 438 (6th Cir. 1996).

Defendant contends that the Act was violated in three ways, and that counsel was ineffective for failing to move to dismiss on each of these occasions. First, defendant argues that 83 days elapsed between the declaration of a mistrial in his first trial and the commencement of his second trial. Second, defendant

contends that at least 157 days of non-excludable time elapsed between the declaration of a mistrial in his second case and the dismissal of the indictment, on his motion, based on an improperly constituted grand jury. Third, after the dismissal of the indictment and his arraignment on a third superceding indictment, defendant was not brought to trial until 78 days later.

Assuming that there was a violation of the Speedy Trial Act, and that counsel was deficient in failing to raise the issue, defendant is still not entitled to relief on this claim because he cannot establish prejudice. Defendant does not allege that the delay occasioned any prejudice in the preparation of his case, such as a witness becoming unavailable. Thus, the only possible prejudice to defendant would hinge upon the possibility that the motion would have been granted with prejudice, precluding the government from trying him at all. Defendant cannot establish this type of prejudice.

Under the Act, "[i]n determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice." 18 U.S.C. § 3162(a)(1). Each of these factors would have counseled a dismissal without prejudice in defendant's case. Defendant was charged with involvement and an extensive, serious drug distribution conspiracy, for which he was sentence to nearly 30 years' imprisonment. See United States v. Howard, 218 F.3d 556, 561 (6th Cir. 2000) (looking to length of sentence to determine severity of offense). As to the second factor,

the delays in defendant's case were not extensive and were occasioned in part by the complexity of the procedural issues involved, including two previous hung juries and a reindictment because of an improperly constituted grand jury. Further, there is no evidence of bad faith or any attempt to take advantage of the delay on the part of the prosecution. See id. Finally, as to the third factor, defendant does not allege that he suffered any actual prejudice as a result of the delay, and there is no allegation that the government engaged in any improper behavior which must be deterred in order to insure compliance with the Act. See id. at 561-62, In these circumstances, any dismissal under the Act would have been without prejudice.

Because any dismissal under the Speedy Trial Act would have been without prejudice to the government reinstituting the charges and trying defendant anew, he cannot establish that he was prejudiced by his counsel's failure to file a motion to dismiss. See United States v. Jackson, No. 00-1653, 2001 WL 1042180, at *2 (6th Cir. Aug. 30, 2001) (no prejudice to sustain ineffective assistance of counsel claim where defendant did not "demonstrate[] a reasonable probability that the district court would have dismissed the indictment with prejudice."); United States v. Theurer, No. 93-3310, 1994 WL 420072, at *7 (7th Cir. Aug. 11, 1994); United States v. LeFlore, No. 88-1426, 1989 WL 40296, at *2 (6th Cir. Apr. 25, 1989) (Merritt, J., concurring); Harvey v. United States, 850 F.2d 388, 402-03 (8th Cir. 1988); United States v. Cook, 48 F. Supp. 2d 776, 777 (N.D. Ill. 1999); Patiwana v. United States, 928 F. Supp. 226, 240 (E.D.N.Y. 1996). Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

3. Trial

Defendant next raises numerous allegations of ineffective assistance of counsel in connection with counsel's performance during trial.

a. Failure to Object to Reference to Organized Crime (Ground IV.A)

Defendant first contends that counsel was ineffective for failing to object and move for a mistrial after government witness Richard Carroll, a New York City police officer, testified that at the time of his testimony he was assigned to the Organized Crime Control Bureau, See Trial Tr., dated 7/16/98. The Court should conclude that defendant is not entitled to relief on this claim.

Although defendant contends that this remark was "irrelevant, inflammatory and prejudicial," Def.'s Br., at 22, he does not state how he was prejudiced by this single reference to organized crime. Notably, the comment was in no way connected with his case, but was simply part of background testimony concerning the witness's current employment. Nowhere in his testimony did Carroll relate any of the allegations against defendant to organized crime, and he also testified that he was assigned to the Street Crime Unit, not the Organized Crime Control Bureau, at the time he arrested coconspirator Carol Bayless. Thus, there is not a reasonable probability that the comment influenced the jury's verdict in any manner. See, e.g., United States v. Catalano, No. 91-50372, 1992 WL 212322, at *2 (9th Cir. Sept. 3, 1992) (per curiam) (defendant not denied a fair trial by prosecutor's

comments concerning organized crime where references were isolated and not inflammatory); United States v. Thirion, 813 F.2d 146, 156 (8th Cir. 1987) (defendant not denied a fair trial by question relating to whether defendant, an attorney, had represented an organized crime figure; the matter came up only once during the course of a lengthy trial and defendant's answer linked the client, and not defendant, to organized crime); United States v. Wilson, 598 F. Supp. 138, 143 (E.D. Pa. 1984) (prosecutor's statement in closing argument that organized crime leader lived in a rowhouse made in response to defense counsel's argument that defendant could not have been leader of drug ring because defendant lived in a small rowhouse did not link the defendant to organized crime; prosecutor made no actual attempt to link the defendant to organized crime and the remark was an isolated one), Accordingly, the Court should conclude that petitioner is not entitled to relief on this claim.

b. Prejudicial Remarks to Jury (Ground IV.B)

Defendant next contends that counsel was ineffective for making prejudicial remarks to the jury. Specifically, during opening statement and closing argument counsel indicated a lack of concern for the jury's verdict, telling the jury, for example, that "[y]ou are here to seek the truth. What the heck is the truth? Is Robert Campbell guilty? If he is, convict him. If he's not, let him go." Trial Tr., dated 7/17/98, at 14-15. Defendant contends that these types of statements by counsel indicated a lack of concern in the verdict and a disbelief of defendant's own testimony.

On the contrary, counsel repeatedly emphasized the burden of proof, requiring the prosecutor to prove the charges against petitioner beyond a reasonable doubt. He also repeatedly stated that, in his view and for reasons he explained at length to the jury, the prosecutor had not met this burden. While counsel's discussion of the burden of proof was perhaps not as eloquent as it could have been, counsel at all times acted as an advocate for defendant and pressed defendant's case. In these circumstances, the comments of counsel do not amount to constitutionally ineffective assistance. See United States v. Williamson, 53 F.3d 1500, 1510-12 (10th Cir. 1995). Accordingly, the Court should conclude that petitioner is not entitled to relief on this claim.

c. Failure to Call Character Witnesses (Ground IV.D)

Defendant next argues that counsel was ineffective for failing to call character witnesses who would have bolstered his testimony at trial by testifying to his reputation for truthfulness. This claim fails for two reasons.

First, it is unlikely that such character evidence would have been admissible. The Federal Rules of Evidence provide that "evidence of truthful character [of a witness] is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Fed. R. Evid. 608(a)(2). Although the prosecution certainly attacked defendant's truthfulness in this case through cross-examination and other evidence, defendant has pointed to nothing in the record showing that the government attacked his character for truthfulness, as required for

his character evidence to have been admissible. It is well established that "[v]igorous cross examination and/or the fact that a witness is contradicted by other evidence in the case does not constitute such an attack," United States v. Thomas, 768 F.2d 611, 618 (5th Cir. 1985); see also, United States v. Dring, 930 F.2d 687, 691-92 (9th Cir. 1991); United States v. Danehy, 680 F.2d 1311, 1314 (11th Cir. 1982). Thus, it is unlikely that such evidence would have been admitted, and defendant cannot show that counsel was ineffective.

Second, defendant has provided no information regarding this testimony that he says counsel should have presented. He has identified no specific witnesses, nor detailed what their testimony would have been. Because defendant has failed to detail what witnesses should have been examined more fully or what additional witnesses should have been called, he is unable to rebut the strong presumption that his counsel's actions were the product of sound trial strategy. See Porter v. Singletary, 883 F. Supp. 660, 667 (M.D. Fla. 1995). Likewise, "[w]ithout producing or otherwise detailing the witnesses' testimony, the petitioner's claim essentially relies on speculation about what unidentified persons might have said, and such a showing fails to carry [his] burden to show prejudice." Veal v. Cooper, 936 F. Supp. 511, 51415 (N.D. Ill. 1996) (internal quotation omitted) (citation omitted). Accordingly, the Court should conclude that defendant is not entitled to relief on this ground.

d. Eliciting of Prejudicial Testimony (Ground IV.E)

Defendant next argues that counsel was ineffective for eliciting prejudicial testimony from government

witnesses. However, after examining the isolated questions asked by counsel and identified as error by defendant in context, the Court should conclude that counsel was not ineffective.

Defendant first contends that counsel erred by asking a DEA agent whether, during surveillance of a motel where a drug exchange was occurring, the agent thought that the two people in a Mercury Villager automobile (which included defendant) were involved in the transaction. The agent responded, "Definitely." See Trial Tr., dated 7/20/98, at 48. However, it is clear from the questions preceding and following this one question that counsel was casting doubt on the agent's belief. Counsel was attempting to show that the agent's belief was not credible given that he did not have the Villager followed by another agent when it left the motel parking lot. Counsel asked a number of questions establishing this fact, as well as the fact that the agent did not see defendant carrying anything either to or from the room in which the other conspirators were apparently conducting the transaction. See id at 45-51. Taken in context, counsel was not ineffective for eliciting this testimony.

Second, during cross-examination of a Sterling Heights police officer working with the DEA on the surveillance, counsel followed up on the officer's direct examination testimony. During direct examination, the officer testified that he recognized defendant from a photograph he had previously seen. See id. at 54. During cross-examination, counsel asked the officer where he had seen the photograph. The officer responded that he had seen the picture in a home that had been the subject of a prior narcotic raid. See id. at

61. Although this answer was probably not what counsel had hoped for, counsel adopted a legitimate strategy in attempting to question the officer's observations and identification of defendant.

Finally, during the cross-examination of another DEA agent, counsel attempted to elicit from the agent that he was relying primarily on the word of the government witnesses. After admitting this to be the case, the agent slipped in that he was relying "[n]ot solely [on] the fact of the people that you were discussing." See id. at 97-98. This isolated statement came after counsel elicited repeatedly from the agent that he was, in fact, relying primarily on the word of the government witnesses, and that he had no independent evidence, through surveillance, to indicate that defendant was involved in the crime. See id. In light of counsel's successful cross-examination, it is difficult to see how this isolated statement would have, in defendant's view, lead the jury to conclude that there were other witnesses who did not testify.

"In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). Because "the conduct of examination and cross-examination is entrusted to the judgment of the lawyer," a reviewing court "on a cold record should not second-guess such decisions unless there is no strategic or tactical justification for the course taken." United States v. Luciano, 158 F.3d 655, 660 (2d Cir. 1998). While counsel's questions to the witnesses may illustrate "a classic example of the first rule of cross-

examination; don't ask a question unless you know what the answer will be," State v. Boradnax, No. 18169, 2001 WL 127779, at *2 (Ohio Ct. App. Feb. 16, 2001), the only issue for the Court is "whether counsel's conduct in asking the question fell below an objective standard of reasonableness." Id. As discussed above, each of the questions was part of a vigorous cross-examination and based on a legitimate strategy of attempting to undermine the witness's direct examination testimony. Defendant therefore has failed to show that counsel's performance was deficient, and the Court should conclude that he is not entitled to relief on this claim.

e. Failure to Impeach Orlando Bayless (Ground IV. G)

Defendant also argues that counsel was ineffective for failing to properly impeach government witness and co-conspirator Orlando Bayless during cross-examination. Defendant contends that Bayless should have been impeached regarding inconsistencies between his testimony at defendant's second and third trials concerning the amount of money defendant contributed to purchase the drugs. He also contends that Bayless should have been impeached with the statement he initially gave to the police denying any knowledge of the money seized by the police.

It is true that counsel could have chosen to attack Bayless through the inconsistencies in his testimony. However, the inconsistencies identified by defendant were relatively minor, addressing whether defendant had brought $70,000 or $80,000 to the motel. Counsel instead chose to focus his attack on Bayless on the substantial sentence reduction Bayless was hoping to receive in exchange for his testimony, and on Bayless's

significant drug related activity. This was a reasonable trial strategy. Further, defendant is unable to establish that he was prejudiced by counsel's failure to question Bayless about these minor inconsistencies. Counsel's "'actual cross cast a general shadow over [Bayless's] character and veracity by bringing out his drug [dealing] and hinting at a motive for lying in the form of [Bayless's plea agreement with the government and expected lenient sentence]. The court cannot imagine that a jury unpersuaded by this information would have rejected [Bayless's] testimony based on inconsistencies in some rather minor details.'" Johnson v. Alabama, 256 F.3d 1156, 1186 (11th Cir. 2001) (quoting trial court's opinion at Johnson v. Nagle, 58 F. Supp. 2d 1303, 1356 (N.D. Ala. 1999)). Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

f. Failure to Object to Videotaped Statement/Officer Testimony (Ground VI)

Defendant next contends that counsel was ineffective for failing to properly object to the admission of a videotaped statement by Carol Bayless and the notes of the officer who interrogated her. However, the court of appeals found that this testimony was properly admitted because defense counsel had attacked Bayless's testimony, asking whether she had filed an affidavit claiming that her confession had been coached, and was not truthful. Thus, the evidence was admissible "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]" Fed. R. Evid. 801(d)(1)(B); see Campbell, 2000 WL 1597858, at *4-*5. Because the court of appeals's conclusion that the evidence was admissible is

binding on this Court, defendant cannot show that counsel was ineffective for failing to object, or that he was prejudiced by counsel's failure. Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

g. Failure to Object to Testimony of Attorney (Ground VII)

Defendant next contends that counsel was ineffective for failing to object to the testimony of Joyce London, the appointed counsel for Carol Bayless. The court of appeals concluded that this testimony was relevant, and did not amount to improper bolstering of Bayless because "London did not testify that she had corroborated any of Carol's testimony nor did she either state or imply that she believed Carol's testimony was truthful," Campbell, 2000 WL 1597858, at *5. Again, this conclusion is binding on this Court, and defendant therefore cannot show either that counsel was deficient or that he was prejudiced by counsel's failure to object. Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

h. Failure to Object to Prosecutorial Misconduct (Ground V)

Defendant next contends that counsel was ineffective for failing to object to several instances of prosecutorial misconduct. Specifically, defendant argues that the prosecutor improperly vouched for the credibility of the witnesses, expressed his personal opinion of defendant's guilt, and made inflammatory emotional appeals. Again, however, the court of appeals rejected

the merits of each of these underlying claims of prosecutorial misconduct. While it is true that the court did so under the plain error standard of review because defendant failed to object, it is clear from the language used by the court that it found no error, plain or otherwise. The court concluded that the prosecutor's remarks regarding the credibility of the witnesses were based on the evidence and were proper because they were "made in the context of responding to the defendant's suggestion that the witnesses were required to incriminate Robert in order to get the prosecutor to ask for a sentence reduction." Campbell, 2000 WL 1597858, at *3; see also, Darden v. Wainwright, 477 U.S. 168, 182 (1986) (one factor in evaluating claims of prosecutorial misconduct is whether the prosecutor's statement was "invited by or was responsive to the [closing argument] of the defense.").

The prosecutor's argument with respect to Carol Bayless's testimony was likewise not improper, because it was merely a summation of the evidence from which the prosecutor asked the jury to draw the conclusion that her testimony was credible. See Campbell, 2000 WL 1597858, at *3; See, e.g., Nichols v. Scott, 69 F.3d 1255, 1283 (5th Cir. 1995) (comment "is permissible to the extent that it draws a conclusion based solely on the evidence presented.") (internal quotation omitted); United States v. Grey Bear, 883 F.2d 1382, 1392 (8th Cir. 1989); Martin v. Foltz, 773 F.2d 711, 717 (6th Cir. 1985) (prosecutor may argue permissible inferences from the evidence); United States ex rel. Williams v. Washington, 913 F. Supp. 1156, 1163 (N.D. Ill. 1995) (prosecutor's assertion during closing argument that the defendant had "lied" did not deprive petitioner of a

fair trial where "the prosecution's statements were reasonable inferences drawn from the physical evidence and witness testimony[.]"); Miller v. White, No. C-93-20648 RPA, 1994 WL 621671 (N.D. Cal. Oct. 17, 1994) (a prosecutor "is privileged to argue to the jury that it was his opinion formed from deductions made from evidence adduced at the trial that the defendant was guilty of the crime charged.") (internal quotation omitted).

Finally, the court of appeals concluded that the prosecutor's appeal to the jury's emotions, even if improper, did not prejudice defendant because they were isolated remarks which merely emphasized that the discovery of the conspiracy was fortuitous. See Campbell, 2000 WL 1597858, at *4. In light of the court of appeals's resolution of defendant's substantive prosecutorial misconduct claims, defendant cannot show that counsel was deficient or that he was prejudiced by counsel's failure to object. Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

4. Jury Instructions

In his next set of claims, defendant contends that counsel was ineffective in connection with the jury instructions given by the Court.

a. Failure to Propose Defense Theory Instruction (Ground IV.C)

Defendant first contends that counsel was ineffective for failing to request that the Court instruct the jury on the defense theory of the case. However, defendant

cannot show that he was prejudiced by counsel's failure because his theory was adequately conveyed to the jury by the Court's instructions on the elements of the government's charges and the burden of proof. Defendant's theory of the case was a simple denial of involvement in the conspiracy. "Where the theory is a denial of the charge, the theory is adequately presented by instructions on the burden of proof of each element and on the presumption of innocence." United States v. Pruitt, 719 F.2d 975, 978 (9th Cir. 1983); see also, United States v. Mack, 159 F.3d 208, 218 (6th Cir. 1998) (trial court did not err in failing to give defense theory instruction because requested instruction was merely "a categorical denial of the charges contained in the indictment[,]"). Thus, defendant cannot show that he was prejudiced by the omission of a defense theory instruction. Cf. Moreno v. United States, No. 93-1074, 1993 WL 443824, at *3 (1st Cir. Nov. 3, 1993) (counsel not ineffective for failing to request special instructions where defendant presented reasonable doubt defense). Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

b. Failure to Object to Court Security Officer Reference (Ground IV.F)

Defendant also argues that the Court erred in referring to the presence of court security officers, and that counsel consequently was ineffective for failing to object to this reference. The Court should conclude that defendant is not entitled to relief on this claim. The Court's brief reference, at the start of voir dire, was in the context of explaining the roles of the various people seated in the courtroom. In this context, it is not likely, as defendant suggests, that the prospective jurors

viewed the Court's statement as an indication that defendant was a violent person, or that the brief statement at the start of the trial impacted the jury's deliberations after several days of testimony. Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

c. Failure to Request Unanimity Instruction (Grounds IV.F and VIII.A)

Defendant next contends that counsel was ineffective for failing to request an instruction regarding unanimity on the conspiracy charge. Because the conspiracy charge related to both heroin and cocaine, defendant contends that the jury should have been instructed that they had to unanimously find that he conspired to possess with intent to distribute heroin, or that they had to unanimously find that he conspired to possess with intent to distribute cocaine. He contends that the Court's instruction allowed the jury to convict if all jurors concluded he conspired to possess a controlled substance, even if they were less than unanimous with respect to which substance was actually involved.

Defendant is not entitled to relief on this claim for two reasons. First, the Sixth Circuit rejected the underlying substantive claim on defendant's direct appeal. The court explained: "[S]pecific unanimity is required only where the evidence is exceptionally complex, if there is a variance between the indictment and the proofs at trial, or if there is a 'tangible indication of jury confusion.' There were no such complex circumstances in this case." Campbell, 2000 WL 1597858, at *5 (citation omitted) (quoting United

States v. Washington, 127 F.3d 510.513 (6th Cir. 1997)). Second, defendant cannot show that he was prejudiced by the omission of this instruction. The jury unanimously convicted defendant of the underlying substantive offenses, charged in two separate counts, of aiding and abetting others to possess with intent to distribute both heroin and cocaine. Thus, it is clear that the jury unanimously believed that defendant was engaged in both the heroin and cocaine distribution portions of the conspiracy. See United States v. Stewart, 185 F.3d 112, 127-28 (3d Cir. 1999) (failure to give instruction regarding unanimity necessary for finding predicate acts for RICO violation harmless in light of jury verdict finding defendant guilty of all underlying substantive predicate acts in the indictment).fn1 Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

d. Failure to Object to Sentencing Guidelines Instruction (Grounds IV.F and VIII.B)

Defendant next contends that his counsel was ineffective for failing to object to the Court's instruction to the jury regarding the functioning of the United States Sentencing Guidelines, specifically as they related to the Rule 11 plea agreements with the government witnesses. Counsel withdrew his objection to these instructions, however, because he argued during his closing argument that the government witnesses had an incentive to lie in their trial testimony in order to receive a downward departure during their own sentencing. In light of defendant's attacks on the credibility of the witnesses who had reached plea agreements with the government, and the fact that the instructions were an accurate statement of the law, "[i]t

is difficult to see how the instruction could have prejudiced the defendant[]." United States v. Daniels, 986 F.2d 451, 458, superseded on reh'g on other grounds, 5 F.3d 495 (11th Cir. 1993). Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

5. Sentencing (Ground III)

Defendant next contends that counsel was ineffective for failing to request a downward departure at sentencing based on his post-offense conduct and based on the disproportionality between his sentence and those of his testifying codefendants. However, defendant cannot establish that he would have been entitled to a downward departure on these bases, and thus he cannot show that he was prejudiced by counsel's performance.

The Sentencing Guidelines provide that "the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" U.S.S.G. § 5K2.0 (quoting 18 U.S.C. § 3553(b)), The Guidelines also include a list of factors that are ordinarily not relevant to a determination to depart from the guidelines, see U.S.S.G. §§ 5H1.1-.12, and a list of factors which may be relevant to depart, either upward or downward, from the appropriate guidelines sentence, see U.S.S.G. §§ 5K2.1-.21. See generally, Koon v. United States, 518 U.S. 81, 92-96 (1996). A sentencing court "must bear in

mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'" Koon, 518 U.S. at 96.

Neither post offense behavior nor disproportionality are mentioned in the Guidelines as a basis for departure. Nor would a departure on either of these bases have been appropriate. While post-offense, pre-sentencing behavior may be a permissible basis for a downward departure, this is the case only where post-offense rehabilitation is "present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted." United States v. Brock, 108 F.3d 31, 35 (4th Cir. 1997), quoted in United States v. Biehl, No. 98-3318, 1999 WL 98600, at *2 (6th Cir. Jan. 25, 1999) (per curiam). Here, defendant merely abided by the terms of his bond conditions and refrained from engaging in further criminal activity. Such routine conduct does not take defendant's case out of the "heartland" of cases crafted by the Guidelines. As the Sixth Circuit explained in Biehl:

Some degree of presentence rehabilitation is to be expected from a penitent defendant, whether due to a true acceptance of responsibility or from one who simply wants to "put his best foot forward" at sentencing with hopes of receiving leniency from the sentencing court. Furthermore, in order to keep the temporary liberty defendant was given by [being released on bond], abiding by the fairly typical terms of his presentence release is not unexpected. As the First Circuit stated, "such predictable reactions, while laudable, fall shy of what we believe is necessary to take cases out of the heartland."

Biehl, 1999 WL 98600, at *3 (quoting United States v. Sklar, 920 F.2d 107, 117 (1st Cir. 1990)).

Likewise, defendant would not have been entitled to a downward departure based on the disparity between his sentence and those given to his codefendants who pleaded guilty. As the courts have explained, it would be impermissible under the Sentencing Guidelines for the Court to depart downward in an attempt to make defendant's sentence the same as his codefendants':

> [I]t is axiomatic that a proper application of the Sentencing Guidelines determines the relative culpability of a defendant for purposes of sentencing . . . . Departures based on "relative culpability" would allow district courts to ignore their own factual determinations.

United States v. Perkins, 108 F.3d 512, 516 (4th Cir. 1997); see also, United States v. Withers, 100 F.3d 1142, 1149 (4th Cir. 1996) ("The circuits unanimously agree that disparate sentences among codefendants is an impermissible ground for depature.") (citing cases from every circuit); United States v. Epley, 52 F.3d 571, 583-84 (6th Cir. 1995).

In short, defendant would not have been entitled to a downward departure upon either basis which he asserts counsel should have advanced at sentencing. He thus cannot show that he was prejudiced by counsel's actions in connection with his sentencing, and the Court should accordingly conclude that defendant is not entitled to relief on this ground.

6. Cumulative Error

Defendant also contends that he was denied a fair trial by the cumulative effect of trial counsel's errors. It is true that "[e]rrors which standing alone may be deemed harmless or insufficiently prejudicial to amount to a denial of due process may cumulatively produce a trial setting which is fundamentally unfair." Payne v. Janasz, 711 F.2d 1305, 1316 (6th Cir. 1983) (Jones, J., dissenting); accord Walker v. Engle, 703 F.2d 959, 968 (6th Cir. 1983). This rule, however, applies only to constitutional errors; the accumulation of non-errors cannot collectively amount to a violation of due process. See United States v. Lumpkin, 192 F.3d 280, 290 (2d Cir. 1999); McKinnon v. Ohio, No. 94-4256, 1995 WL 570918, at * 12 (6th Cir. Sept. 27, 1995); Fero v. Kerby, 39 F.3d 1462, 1475 (10th Cir. 1994). As noted and discussed in this section, none of defendant's allegations establish constitutional error, and thus his cumulative error claim fails.

E. Apprendi Claim (Ground II)

Defendant finally contends that his sentence violates the rule established by the Supreme Court in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). In Apprendi, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 120 S. Ct. at 2362-63. In United States v. Page, 232 F.3d 536 (6th Cir. 2000), the Sixth Circuit held that the Apprendi rule applies to the determination as to the amount of drugs necessary to impose the statutory mandatory minimum sentences

provided in § 841(b)(1). See Page, 232 F.3d at 242-43; see also, United States v. Flowal, 234 F.3d 932, 936 (6th Cir. Dec. 11, 2000).

Every court of appeals to have considered the issue has held that the Apprendi rule does not apply retroactively to cases on collateral review. See United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001); United States v. Moss, 253 F.3d 993, 997 (8th Cir. 2001); McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); Jones v, Smith, 231 F.3d 1227, 1238 (9th Cir. 2000); see also, Snyder v. United States, No. 01-1258, 2001 WL 1298954, at *2 (6th Cir. Aug. 7, 2001). Defendant contends that this rule does not apply to him, however, because Apprendi was decided while his appeal was still pending. It is nevertheless not clear whether defendant can raise his Apprendi claim on collateral review. Griffth v. Kentucky, 479 U.S. 314 (1987), upon which defendant relies, holds only "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" Id. at 328. While this rule would have mandated retroactive application of Apprendi to defendant's criminal trial by the Sixth Circuit on direct appeal, under the current posture defendant's case is not "pending on direct review or not yet final." Further, even if defendant could invoke Apprendi retroactively, his failure to raise the issue on direct appeal constitutes a procedural default. See United States v. Frady, 456 U.S. 152, 167-68 (1982).

In any event, defendant is not entitled to relief on the merits of his Apprendi claim. Under § 841, defendant was subject to no mandatory minimum sentence and to

a maximum sentence of 20 years' imprisonment for his drug conviction. See 21 U.S.C. § 841(b)(1)(C). However, the penalty range increased to a mandatory minimum term of 10 years' imprisonment and a maximum term of life imprisonment if his conviction involved more than 1 kilogram of heroin or more than 5 kilograms of cocaine. See 21 U.S.C. § 841(b)(1)(A). Defendant's sentence of 324 months-27 years-falls into this enhanced sentencing range. Therefore under Apprendi, as interpreted by the Sixth Circuit in Flowal and Page, the quantity of the drugs involved was required to be submitted to the jury and proved beyond a reasonable doubt.

However, this fact alone does not entitle defendant to relief. The Supreme Court has held that "the omission of an element [in a jury instruction] is an error that is subject to harmless-error analysis." Neder v. United States, 527 U.S. 1, 15 (1999). Because, under Apprendi, the quantity of drugs is an element of the offense for an enhanced sentence under § 841(b)(1), this harmless error rule applies in defendant's case. See United States v. Barbosa, 271 F.3d 438, 459 (3d Cir. 2001); United States v. Sanchez, 269 F.3d 1250, 1272 (11th Cir. 2001); United States v. Virgen-Moreno, 265 F.3d 276, 297 (5th Cir. 2001); United Staes v. Mietus, 237 F.3d 866, 875 (7th Cir. 2001); cf. United States v. King, 272 F.3d 366, 378-79 (6th Cir. 2001) (finding, under plain error review, that Apprendi error did not affect defendant's substantial rights, which is "akin to the harmless error analysis employed in preserved error cases,"). Thus, defendant is not entitled to relief on this claim if the failure to submit the quantity determination to the jury was harmless beyond a reasonable doubt.

Here, the fact which increased defendant's statutorily prescribed sentencing range was the amount of heroin or cocaine involved in the conspiracy-either more than one kilogram of heroin or more than five kilograms of cocaine increased the statutorily prescribed range to the range in which defendant was sentenced. Once the jury determined beyond a reasonable doubt that defendant was involved in the conspiracy, it could have had no doubt that the conspiracy involved more than one kilogram of heroin and more than five kilograms of cocaine. Leaving aside any other transactions about which there may have been a dispute, it was undisputed that the police seized 34 kilograms of cocaine and 2 kilograms of heroin from Carol Bayless's car. In other words, "[i]f this jury was going to convict [defendant] at all-which it plainly did-there is simply no way on this record that it could have failed to find that he was conspiring to distribute" one kilogram or more of heroin and five kilograms or more of cocaine. United States v Nance, 236 F.3d 820, 826 (7th Cir. 2000). Thus, the error in failing to submit the drug quantity determination to the jury was harmless beyond a reasonable doubt. See King, 272 F.3d at 379-80 (error did not affect substantial rights of defendant--i.e., was harmless-where one package seized by police contained an amount sufficient to trigger the enhanced penalties of § 841(b)(1)(A)); United States v. Booker, 260 F.3d 820, 823 (7th Cir. 2001) ("We are also confident, given that the police actually recovered amounts in excess of 50 grams, that a jury which convicted Booker would have been compelled to find that Booker's crimes involved in excess of 50 grams of crack cocaine."); United States v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000) (failing to submit drug quantity determination to jury harmless where defendant was sentenced to enhanced range

based on 5 grams or more of crack cocaine and it was undisputed that police seized 14.8 grams from defendant's home). Accordingly, the Court should conclude that defendant is not entitled to relief on his Apprendi claim. fn2

F. Conclusion

In view of the foregoing, the Court should conclude that defendant has not established his entitlement to relief under § 2255 because his claims ineffective assistance of counsel claims are without merit, and because any Apprendi error was harmless beyond a reasonable doubt. Accordingly, the Court should deny defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. Thomas v. Arn, 474 U.S. 140 (1985); Howard v. Secretary of Health & Human Servs., 932 F.2d 505 (6th Cir. 1991); United States v. Walters, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. Willis v. Secretary of Health & Human Servs., 931 F.2d 390, 401 (6th Cir. 1991); Smith v. Detroit Federation of Teachers Local 231, 829 F.2d

1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: Jan. 24, 2002

Footnotes

fn1 A third reason for rejecting this claim is that "a guilty verdict does not require jury unanimity regarding the type of drugs involved." United States v. Wiggins, 104 F.3d 174,177 (8th Cir. 1997); see also, Horton v. United States, 244 F.3d 546, 552 (7th Cir. 2001); cf. United States v. Vincent, 20 F.3d 229, 235-36 (6th Cir. 1994) (specific type of firearm used is not an element of offense of using a firearm in relation to a drug offense). It is true that when "defendants are convicted by a verdict that is ambiguous as to what type of drug they possessed or distributed, they may not be sentenced based upon the alternative producing the higher sentence range." Wiggins, 104 F.3d at 177-78. Further, the type of drug involved may need to be proved to a jury beyond a reasonable doubt in some circumstances under the Supreme Court's decision in

Apprendi. However, as discussed below, defendant cannot benefit from the Apprendi decision, and "when trial evidence leaves no doubt as to the substance involved, it is not error to sentence a defendant consistent with that evidence." Wiggins, 104 F.3d at 178. Thus, the type of drug was not an element of the conspiracy offense, and defendant could be sentenced based on either drug in light of the jury's finding that he aided the distribution of both heroin and cocaine.

fn2 To the extent that defendant claims the Court erred in determining, based on a preponderance of the evidence, the amount of drugs involved for purposes of determining a sentence under the Guidelines within the statutorily prescribed range, the claim is without merit. Apprendi involves only those factors that alter the statutory range of punishment; it does not prohibit a judge from determining factors which affect the duration of a sentence imposed within that statutory range. See United States v. Fields, 251 F.3d 1041, 1043-44 (D.C. Cir. 2001); United States v. Robinson, 241 F.3d 115, 119 (1st Cir. 2001); United States v. Obi, 239 F.3d 662, 667 (4th Cir. 2001); United States v. Doggett, 230 F.3d 160, 165-66 (5th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926, 933-34 (8th Cir. 2000).